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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-166

FIDELITY TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Fidelity Television, Inc., prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, while not yet officially reported, has been unofficially reported at 32 P & F *Radio Reg.* 2d 1607 (1975), and is printed in the Appendix

at page 1a.[1] The per curiam opinion of the same court on petitions for rehearing, reconsideration or clarification and suggestions for rehearing en banc and the statement of Bazelon, Chief Judge, as to why he voted to grant rehearing en banc are not yet officially reported, but are unofficially reported at 34 P & F *Radio Reg.* 2d 419 (1975), and are printed in the Appendix at page 34a. The Decision of the Federal Communications Commission is officially reported at 44 F.C.C.2d 123 (1973) and is printed in the Appendix at page 94a. The Initial Decision of the Hearing Examiner is not officially reported, but is unofficially reported at 16 P & F *Radio Reg.*2d 1181 (1969), and is printed in the Appendix at page 121a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 6, 1975. An order denying petitions for rehearing, reconsideration or clarification was entered on June 30, 1975. An order staying the issuance of the mandate of the Court of Appeals pending the filing of a Petition for Writ of Certiorari was entered on July 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the interpretation of the First Amendment requirement of diversification of the media by the F.C.C. and the Court of Appeals in this case comport with the prior decisions of this Court?

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[1] References to the Appendix are indicated as "(A. ___)".

2. Where it was found that the renewal applicant and its parent company had engaged in prohibited reciprocal trade practices, did the F.C.C. act arbitrarily in finding that such conduct neither disqualified the renewal applicant nor reflected adversely upon its character so as to require the assessment of a comparative demerit?

3. Was the competing applicant denied due process of law where allegations were made against it in petitions to enlarge the issues, where the petitions were denied by the Commission so that no hearing on the allegations was held, and where the Commission then used the allegations in the petitions as a basis for a decision adverse to the competing applicant?

4. In a comparative broadcast license renewal case, does the Communications Act permit the granting of a preference for the factor of "continuation of existing service" apart from any credit which may be given for the past performance of the renewal applicant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions and statutes are involved herein:

The First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Communications Act of 1934, as amended, 47 U.S.C., which provides as follows:

"Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . ."

* * *

"Sec. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United

States because of the previous use of the same, whether by license or otherwise."

* * *

"Sec. 307(d). No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby."

* * *

"Sec. 309(h). Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station or any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; . . ."

* * *

"Sec. 313(a). All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be ap-

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plicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respet of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: PROVIDED, HOWEVER, That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court."

STATEMENT OF THE CASE

This case involves a comparative hearing before the Federal Communications Commission (hereinafter "the Commission") between RKO General, Inc. ("RKO"), a license renewal applicant for KHJ-TV, Channel 9, Los Angeles, California, and Fidelity Television, Inc., ("Fidelity"), an applicant for a construction permit for a new commercial television station to be operated on the same channel.

RKO is a subsidiary of General Tire & Rubber Company and licensee of *AM*, *FM*, and *TV* stations serving New York City, Los Angeles, Boston, Detroit, and Memphis, and of *AM* and *FM* stations serving Washington, D.C., and San Francisco. It also controls *CATV* franchises serving almost 100 cities and towns across the country. (A. 58a)

Fidelity is composed of 20 prominent citizens of southern California and has no media interests apart from its application to the F.C.C.[2]

The two mutually-exclusive applications were filed in 1965, and following designation by the Commission in June, 1966, a hearing was held on the standard comparative issue of which applicant would better serve the public interest.

During the hearing, on March 2, 1967, the Department of Justice filed suit in the United States District Court for the Northern District of Ohio against the General Tire & Rubber Company, Aerojet General Corporation, A. M. Byers Company, and RKO, the latter three companies all subsidiaries of General Tire, alleging that the four companies had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by engaging in coercive and mutual patronage reciprocity.

The record in the F.C.C. comparative hearing was closed on June 15, 1967, and then reopened to receive evidence concerning the anti-competitive practices of KHJ-TV, after which it was finally closed on August 26, 1968. The antitrust case against General Tire and its subsidiaries was ultimately concluded by a consent decree on October 21, 1970.

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[2] One 3% stockholder of Fidelity has a 10% interest in a *CATV* franchise 50 miles from Los Angeles. (A. 59a).

In his Initial Decision, released August 13, 1969, the F.C.C. Hearing Examiner[3] held that RKO's "on-the-air operation miserably failed to serve the public interest," and that RKO had engaged in business practices (reciprocity) which suggested "several licensee qualification disabilities." (A. 276a). He preferred Fidelity due to its "marked superiority over General Tire in the areas of local ownership, diversification of mass communications media, and favorable survey and poll support." (A. 280a). RKO's application was denied and Fidelity's granted. RKO filed exceptions with the Commission. While the case was pending before the Commission, the Department of Justice filed a brief urging disqualification of RKO if the Commission agreed with the facts found by the Hearing Examiner.

Over four years after the Initial Decision, on December 6, 1973, and after Fidelity was compelled to go to the District of Columbia Circuit Court of Appeals twice on petitions for writs of mandamus[4] to force the Commission to decide the case (with KHJ-TV continuing to operate the station all the while), the Commission released its decision reversing the Hearing Examiner and granting RKO's application for renewal of its license for KHJ-TV.[5] (A. 109a).

In its decision, the Commission adopted the Hearing Examiner's findings of facts with few exceptions, but substituted its conclusion for the Examiner's. (A. 109a). It first held that there was no reason either to disqualify RKO or to assess a comparative demerit against RKO for its involvement in anticompetitive trade practices. (A. 100a-101a)

[3] Now known as "Administrative Law Judge."

[4] *See* Fidelity Television, Inc. v. F.C.C., 502 F.2d 443 (D.C. Cir. 1974).

[5] Only two of the seven Commissioners (Robert E. Lee and Charlotte Reid) joined in the decision. Chairman Burch concurred in the result. Two Commissioners (Johnson and H. Rex Lee) dissented and issued statements. Two Commissioners (Wiley and Hooks) did not participate. (A. 94a).

Secondly, the Commission purported to apply the criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), to the facts of record and concluded that KHJ-TV's past broadcast record was average, rather than poor as found by the Hearing Examiner, thus warranting neither a preference nor a demerit. (A. 104a). In this regard, the Commission refused to evaluate the quality of individual programs, but proceeded to counterpose the public's expressed satisfaction with RKO's programming against its expressed dissatisfaction. The Commission also attached weight to KHJ-TV's local origination of some cultural and artistic programming, to its compliance with the Television Code of the National Association of Broadcasters, and to the fact that KHJ-TV had no network affiliation; but minimized the continuously unfavorable public reaction to much of KHJ-TV's programming. (A. 103a-104a)

Thirdly, under the factor of diversification of control of the mass communications media, the Commission effectively ignored RKO's vast media holdings, including television, *AM*, and *FM* stations in Los Angeles, and concluded that neither applicant was entitled to a preference under this criterion. In reaching this conclusion, the Commission underlined that there was "no evidence . . . of any attempt by RKO to influence the operation of KHJ-TV in such a way as to promote any national or other uniform expression of political, economic, or social opinion. . . ." (A. 104a-105a)

Lastly, the Commission concluded on the factor of participation in station operation that neither applicant was entitled to a preference under this criterion, even though Fi-

delity proposed 22.66% full-time integration and substantially more part-time integration of its local stockholders, whereas RKO had none. In minimizing Fidelity's acknowledged quantitative advantage, the Commission stated that the qualitative aspects of Fidelity's proposal "neutralized" the quantitative. (A. 107a) The Commission further equated RKO and Fidelity by contending that both applicants would rely on a professional staff, that Fidelity's principals lacked broadcast experience that KHJ-TV's had acquired, and that RKO gave great autonomy to KHJ-TV's staff in operating the station. (A. 107a).

The Commission ultimately concluded that RKO was the preferred applicant, since credit must be given in a comparative renewal hearing, where the applicants are otherwise equal, for the value to the public in the continuation of the existing service. (A. 108a-109a)

On March 6, 1975, the United States Court of Appeals for the District of Columbia Circuit issued its opinion affirming the Commission's decision.[6] (A. 1a). With respect to the reciprocal trade practices issue, the Court of Appeals asserted that the "antitrust law on reciprocity is not entirely settled." (A. 21a). It characterized some of RKO's practices as "unilateral, unsuccessful attempt[s] at reciprocity," (A. 22a), and expressed doubt as to whether an antitrust violation flowed therefrom. The court also found instances of successful reciprocity, but minimized their import because "[m]ost of these [instances] have little to do with RKO, and even less with KHJ[-TV]...." (A. 22a). The court recognized that the practice under attack was "affirmatively declared illegal" in 1966 in the

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[6] Jurisdiction obtained under Section 402 of the Communications Act of 1934, 47 U.S.C. § 402.

General Dynamics case, 258 F.Supp. 36, (S.D.N.Y. 1966), (A. 23a), yet it devaluated the precedential impact of this case because a merger had been involved there but not here.

As to KHJ-TV's past broadcast record, the court refused to conclude "that the Commission's decision that programming performance was 'average' [was] bereft of the support of substantial evidence," (A. 28a), yet it readily acknowledged that there was nothing superior about KHJ-TV's past record. On the basis of this evaluation—one notably replete with negatives—the court supported the Commission's determination.

On the integration factor, the court concluded that while "RKO's local interest performance was [not] any better than Fidelity's could be predicted to be on the basis of the challenger's integration proposal," (A. 30a), it would not "overrule the Commission's finding that it was no worse." (A. 30a).

With respect to diversification, the court concluded that although Fidelity had far fewer media interests than did RKO, a comparison is not based solely on the quantitative. (A. 30a). The court found there to be substantial evidence of RKO's ability to present diverse views over its radio and television stations and in its newspapers, (A. 31a), and the basis of the Commission's decision found support in its previous decisions, "[alt]hough the Commission has vacillated over the years in its general approach to diversification." (A. 31a).

Finally, the court ultimately concluded that "Fidelity and RKO were essentially equally poor contenders —or, at the best, both were minimally acceptable applicants." (A. 31a). The court refused to hold, despite the foregoing professed "equality," that the Commission legally erred in

preferring the incumbent on the sole basis that it was the incumbent, and that as such, its "minimal service" was to be preferred to "no service at all." (A. 31a-32a). The court thus did attach legal weight to RKO's "renewal expectancies," in spite of the fact that its words belied its actions.

On March 27, 1975, Fidelity petitioned the Court of Appeals for a rehearing or clarification of its decision, and Citizens Communications Center, a public-interest law firm, filed a petition in support as amicus curiae.

On June 30, 1975, the court issued a per curiam order denying Fidelity's (and Citizens Communications Center's) petitions. Accompanying this order was a lengthy statement by Chief Judge *Bazelon* as to why he voted to grant an en banc rehearing (A. 39a).

REASONS FOR GRANTING THE WRIT

I. The F.C.C. and the Court of Appeals Have Seriously Undercut the First Amendment as Applied by This Court to Broadcasting

In an extensive discussion of the applicability of the First Amendment to broadcasting in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), the Court said:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."

The basic structure of this First Amendment "marketplace of ideas" had been previously enunciated in *Associated Press*

v. United States, 326 U.S. 1, 20 (1945), where the Court had stated that the First Amendment–

> "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

The need for diverse and antagonistic *sources* of news and information is the cornerstone of this Court's application of the First Amendment to broadcasting, as well as to the resultant F.C.C. policy on diversification of the media of mass communications. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965). Thus the statutory and regulatory scheme has long been directed to the promotion of diversification of the *ownership* of the broadcast media. *See, e.g., Amendment of Rules Relating to Multiple Ownership of AM, FM and Television Broadcasting Stations*, 18 F.C.C. 288, 291 (1953); *TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 938 (D.C. Cir. 1973); *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 n. 36 (D. C. Cir. 1971); *McClatchy Broadcasting Co. v. F.C.C.*, 239 F.2d 15 (D.C. Cir. 1956); *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 351 (D.C. Cir. 1949).

In this case, for the first time, the F.C.C. and the Court of Appeals have effectively emasculated the First Amendment policy on diversification of the ownership of the mass media by equating diverse ownership to common-ownership-with-autonomous-operation. By so doing, the Commission and the court have rejected the principle, long and vigorously defended by this Court, that the only way to assure free, robust, and open debate on public matters is to require that the public's *sources* of news and information be diverse and antagonistic. Such a fundamental change in the law affecting the First Amendment rights of

the public, a change moving inexorably in the direction of monopoly ownership of the media, should be reviewed by this Court.

The circumstances under which this question is raised are not complicated. The record shows that RKO is the licensee of five major-market *VHF* television stations, seven *AM* radio stations, and seven *FM* stations. It is a corporate media conglomerate with controlling interests in a great many *CATV* systems as well as microwave communications facilities, movie theatres, and programming and advertising services. (A. 104a). Fidelity has no media interests apart from the application involved in this case.[7] Yet in a purported but incomprehensible comparison between the two on the issue of diversification of the media of mass communications, the Commission found that neither party was entitled to a preference over the other. (A. 105a).

To reach this result, the Commission referred to several factors which allegedly ameliorate the effect of multiple ownership—factors which have sometimes been considered in determining the weight to be attached to a diversification preference but which have not heretofore been considered significant enough to prevent a party without media interests from obtaining such a preference. These include the number of other media facilities serving the community in question, the fact that RKO's media ownership is not in violation of the Commission's multiple ownership

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[7] One 3% stockholder of Fidelity has a 10% interest in a *CATV* franchise. The Commission's reference to the alleged interest of another Fidelity stockholder in a corporation which publishes advertising throw-aways, erroneously referred to as "newspapers" by the Commission, was rejected by the court below and is not at issue here. (A. 105a)

rules, that renewal of KHJ-TV's license would not increase the concentration of media ownership in any way, and the Commission's preference for rulemaking for across-the-board changes inthe ownership pattern of the broadcast industry. (A. 104a-105a). *See, e.g., Policy Statement on Comparative Broadcasting Hearings, supra; Johnston Broadcasting Co. v. F.C.C., supra; McClatchy Broadcasting Co. v. F.C.C., supra.*

However, the Commission relied heavily on one factor new to the diversification analysis, the fact that there was no showing of any attempt to use KHJ-TV to promote a particular political, economic, or social opinion, nor any undesirable pattern in the station's public affairs programming. (A. 105a).

The Court of Appeals in affirming the Commission's decision acknowledged that if "quantitative" diversification were the basis of comparison, Fidelity should have received a preference on this point. However, the court went on to discover in prior cases that there is also such a thing as qualitative diversification:

> "whether the licensee has in the past met the goals of diversification by operating his stations autonomously and independently."

(A. 30a). On this basis the court affirmed the Commission's determination that Fidelity, with no other media interests, was not entitled to any preference for diversification over RKO, with its 19 major-market broadcasting licenses.

There has never been any such notion as "qualitative" diversification recognized in the prior cases so as to neutralize the impact of multiple media holdings under the diversification issue, as Chief Judge *Bazelon* shows in his discussion of the only two cases cited by the court in support of this dubious proposition (A. 64a-65a).

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The effect of this change in the law is profound and disturbing. If autonomous *operation* of commonly owned media facilities is equivalent in the eyes of the law to diverse ownership, the last barrier to monopoly ownership of the media has fallen. If autonomous operation can prevent a diversification preference in a comparative hearing for a party with no media interests, surely it can be a basis for a waiver of the Commission's Multiple Ownership Rules to permit multiple licensees to obtain additional stations. After all, it is now a judicially sanctioned interpretation of the diversification requirement of the First Amendment.

This change in the law is further contrary to the First Amendment because it shifts the regulatory focus from the objective fact of ownership to the sensitive area of program content, and even beyond that to the substance of the views and opinions expressed over the air. How is a competing applicant to obtain a preference for diversification in the future? Any practitioner before the Commission knows the answer to that. Comparing media facilities owned by the applicants is no longer enough. The competing applicant must now analyze the views and opinions expressed on the commonly owned stations to discern whether there is a pattern. Then there must be inquiry–presumably at the hearing–as to *why* these common views were expressed–for there will inevitably be common viewpoints taken.

The question then is whether the common views were imposed by higher management in the corporate structure, or whether they were separately generated and just coincidentally happened to be voiced over the commonly owned stations. How much impact by higher management is permissible? After all, the licensee is responsible for the station and everyting that goes out over the air except political

programming. What is an "undesirable pattern in the station's public affairs programming"? Undesirable in whose eyes? The Commission's?

The Commission and the Court of Appeals have seriously eroded this Court's First Amendment policy in the broadcasting field, and they have shifted the focus of inquiry from the objective fact of ownership to the previously protected area of the nature of the news and opinions expressed over the air. This significant change in the law governing diversification of the media raises important First Amendment problems and should be reviewed by the Court.

II. It Was an Unlawful Abuse of Discretion for the Commission to Refuse to Assess at Least a Comparative Demerit Against RKO for Engaging in Anticompetitive Reciprocal Trade Practices in the Sale of Time on KHJ-TV and Its Other Stations.

In his Initial Decision, the Hearing Examiner set forth twenty pages of detailed findings concerning the reciprocal trade practices of KHJ-TV, RKO, and its parent company, General Tire (A.231a-262a). He summed up the theme of these practices concisely: "you buy from me–I buy from you." (A. 269a). Prescinding from the question whether these documented practices constituted violations of the antitrust laws, the enforcement of which is not the Commission's primary concern, the Examiner focused on the area which is the Commission's responsibility, and in which its expertise lies, *i.e.*, regulation of the broadcasting industry in the public interest.

The Examiner pointed out the injury done to the public when these reciprocal trade practices are applied to

broadcasting. The principal incentive for meritorious programming is to enable a station to obtain a large audience, which results in the sale of advertising. When the sale of advertising is accomplished through reciprocal practices—when Pepsi-Cola buys advertising on General Tire's stations because General Tire places Pepsi-Cola in its tire manufacturing plants (A. 252a-257a)—a station can ignore the public, as the Examiner found KHJ-TV largely had done in its programming (A. 266a-267a). As the Examiner stated:

> "What stimulus is there for station ownership, management or personnel to expend energy and risk shrinking ownership's purse, in attempting to program a station in meritorious fashion, when all concerned know that the advertising with which the programming is to be associated can be disposed of through inducements largely irrelevant to program quality?" (A. 272a).

The Examiner found that RKO's reciprocal practices suggested several licensee qualification disabilities from the point of view of the public interest. (A. 270a). The Justice Department, viewing the evidence of RKO's reciprocal practices from the point of view of the antitrust laws, and finding that such laws had been violated, filed an *amicus* brief urging that if the Commission upheld the Examiner's findings of fact, RKO's renewal application should be denied. (A. 96a)

The Commission did not disturb the Examiner's findings of fact. It stated:

> "[W]e do recognize that KHJ-TV was involved in a number of mutual patronage situations during this period, as would be normal for any separate entity of a large conglomerate such as General Tire. Thus the question here is not whether

> reciprocal dealing was practices with respect to KHJ-TV, but whether this conduct should reflect adversely upon the operation of the station."[8] (Footnote omitted.) (A. 100a)

The Commission concluded that the reciprocal practices did not reflect adversely upon the station. It did so without referring to the effect of these practices on the broadcasting business or the public, but by rejecting the Justice Department's position concerning the application of the antitrust laws. The Commission excused RKO's reciprocal practices on the ground that "the relevant legal and economic concepts were in a state of flux at the time"; that accordingly RKO cannot be charged with "knowing and wilfull misconduct"; that many other corporations engaged in similar conduct during this period; and that the consent decree which terminated the civil antitrust suit was essentially prospective in nature (A. 101a).

The Court of Appeals did not feel compelled to overturn the Commission's interpretation of the antitrust laws. (A. 23a-24a). No mention was made of broadcasting. Chief Judge *Bazelon*, in his Statement, after analyzing the Court's discussion, concludes: "The holding on this issue is truly extraordinary." (A. 75a)

As the Chief Judge notes, the record establishes that successful mutual patronage reciprocity was engaged in with Pepsi-Cola, Olin Mathieson, Alcoa, American Airlines, and

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[8] It is interesting to note that the Commission considers mutual patronage situations "normal" for a station which is part of a large conglomerate. In this connection it must be remembered that this is the same station which the Commission exculpated from the strictures of the diversification policy on the basis of autonomous and independent operation.

Hertz, that resulted in significant increases in KHJ-TV's revenues. These acts clearly violate Section 5 of the Federal Trade Commission Act and, at least after 1965, violate the Sherman Act (A. 71a-72a) However, assuming, *arguendo*, that RKO's reciprocal practices were not technically a violation of the antitrust laws, they were clearly destructive of the basic economic underpinnings of the nation's system of broadcasting. For the Commission and the court totally to ignore the effect of this conduct on KHJ-TV as a broadcasting station, especially after the Examiner in his decision had focused upon it, was an unlawful abuse of discretion warranting review by this Court. On the basis of this record KHJ-TV should be disqualified as a broadcaster, as the Examiner suggested, or certainly be assessed a major comparative demerit, irrespective of whether it is technically guilty of violating the antitrust laws. The public interest standard of the Communications Act has here been reduced to the standard of the criminal law under a holding that anticompetitive reciprocal trade practices do not reflect adversely upon RKO as a broadcast licensee in any way because it has not been proved that this was "knowing and willful misconduct." The Court should review this denigration and diminution of the public interest standard.

III. Fidelity Was Denied Due Process of Law Where Allegations Were Made Against It in Petitions to Enlarge the Issues, Where the Petitions Were Denied by the Commission with the Result That No Hearing Was Held on the Allegations, and Where the Allegations Were Then Used Against Fidelity in the Commission's Decision.

After the Initial Decision, the Commission's Broadcast Bureau filed a petition to enlarge the issues against Fidelity to inquire into the circumstances surrounding the preparation, signing and filing of stock subscription agreements, amendments of its application, and affidavits. Fidelity opposed the petition and it was denied by the Commission (22 F.C.C. 2d 737). Thereafter, RKO filed a petition to dismiss Fidelity's application, alleging a number of deficiencies involving an amendment filed by Fidelity. Fidelity filed its opposition. The Commission denied the petition and declined to remand the proceeding for a hearing into the allegations made (F.C.C. 71-973).

Then, however, in its Decision, the Commission used these two allegations against Fidelity to deny it a comparative preference to which it was unquestionably entitled on the factor of participation of owners in management of the station. (A. 105a-106a)

Two aspects of this matter are significant. First, the allegations had nothing to do with the factor of integration of ownership and management. The allegations related to Fidelity's compliance with the Commission's reporting requirements, not the integration issue. The Commission, however, used these allegations to reflect adversely on Fidelity's character–its intent to live up to its integration proposal– and found that Fidelity could not be relied upon in this regard.

The second aspect of this matter which requires attention is the fact that Fidelity has been found to have character deficiencies without ever being given an opportunity to defend itself against the charges in a hearing. Commissioner H. Rex Lee stated the matter concisely in his dissent:

> "The majority cannot have it both ways. It cannot reject or dismiss requests for hearing issues and then use the questions raised by the requests against the applicant in the comparative evaluation." (A. 118a).

That, however, is precisely what the Commission did here to deny Fidelity a preference on the factor of integration of ownership and management.

The Court of Appeals did not address this question, which was raised in Fidelity's brief. (*See* Chief Judge *Bazelon's* Comment at A. 67a). Instead the Court constructed its own justification for denying Fidelity a preference on the factor of participation of ownership in management, Fidelity's lack of broadcast experience. However, the Commission itself had rejected that analysis in its *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), where the conflict between favoring diversification of the media on one hand and broadcast experience on the other was addressed. "Since emphasis upon this element [broadcast experience] could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,[8] it will be deemed of minor significance." (1 F.C.C.2d at 396) Footnote 8 to the above passage states, "Lack of experience, unlike a high concentration of control, is remediable. See Sunbeam Television Corp. v. Federal Communications Commission, 100 U.S.App.D.C. 82, 243 F.2d 26." (The Court of Appeals' emphasis on broadcast experience in this con-

text is further evidence of a prostitution of this Court's First Amendment policy of diversification of the media.)

The Commission's denial of administrative due process to Fidelity should be reviewed by this Court.

The Grant of a Comparative Preference to a Renewal Applicant for the Fact that It is Operating on the Frequency, Apart from the Merit of Its Past Performance, Violates Sections 301, 304, 307(d) and 309(h) of the Communications Act of 1934.

In his Initial Decision, the Hearing Examiner found the programming performance of KHJ-TV to be "miserable" and in effect gave RKO a demerit for its reciprocal anti-competitive trade practices. In proposing a grant of Fidelity's application, the Examiner granted preferences for diversification of the media, local ownership, and community surveys. Nonetheless, the Commission, through a herculean effort, raised KHJ-TV's programming performance from poor to average, thus avoiding the virtual necessity of denying its application in the face of a fully-qualified competitor,[9] which Fidelity unquestionably was, and thereby necessitating a comparison of the two applicants on other factors.

As we have seen, the Commission then washed out the strong preference for diversification to which Fidelity was entitled under the First Amendment as heretofore interpreted, and the preference for participation of local ownership in management to which Fidelity was also entitled, by crediting unsupported allegations which it has

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[9] *See* Citizens Communications Center v. F.C.C., 447 F.2d 1201 (D.C. Cir. 1971).

previously rejected as not being of decisional significance.[10] It refused to assess any demerit against RKO for its reciprocal trade practices and thus–*Eureka!*– the parties were equal.

Having concluded that neither party was entitled to any preferences or any demerits on any of the issues, the Commission decided to grant the renewal application of RKO on the ground that credit must be given "for the value to the public in the continuation of the existing service." (A. 108a). The Court of Appeals, suddenly grown strangely timid after having castigating the Commission for the deliberate delaying tactics employed in this case, saw nothing wrong in this. The Court stated:

> "We merely confirm what we intimated in the Greater Boston Television Corporation case–that, when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license. 444 F.2d at 854, 859."

However, that is demonstrably not what the Commission did here. The Commission found KHJ-TV's past performance only average, and as such not entitled to any preference toward renewal. The Commission expressly stated:

> "Under these circumstances, we are persuaded that there are sufficient good points to offset the less

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[10] In the course of its various rulings, the Commission managed to heap an undue amount of scorn upon Fidelity, undoubtedly because Fidelity had developed the presumptively bad habit over the years of waiting for a decision, of going to the Court of Appeals in an effort to expedite the proceeding.

> favorable aspects of KHJ's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus *warranting neither a preference nor a demerit.*" (Emphasis supplied.) (A. 104a)

What the Commission did was to give KHJ-TV a preference for the *fact* that it was operating on the frequency, not for the quality of its past performance. Any preference on the latter ground had been expressly rejected.

A preference based on the fact of past operation on the frequency–mere incumbency– without more, is contrary to the Communications Act. Sections 301, 304, 307(d) and 309(h)(1) of the Act clearly indicate that a licensee is to have no rights in the frequency beyond the term of the license. The granting of a preference based solely on the fact of incumbency, entirely apart from the quality of the licensee's performance, on its face constitutes the granting of a right in the frequency which is forbidden by the statute. The Commission acknowledges as much by stating that "recognition must be given to the rights and expectancies of an ordinary renewal applicant." However, by law the Commission is forbidden to recognize any such rights. *Citizens Communications Center v. F.C.C.*, *supra* at 1207; *see also* A. 50a-57a. The Court should review this important question of the interpretation of this federal statute which on its face prohibits the course of action followed by the agency in this case.

V. Conclusion

The Commission and the Court of Appeals have watered down the First Amendment rights of the public in broadcasting; they have condoned anticompetitive practices on the part of a licensee in derogation of its public trust; they have denied a competing applicant an elementary aspect of due process of law; and they have granted a preference to a renewal applicant which is prohibited by the Communications Act of 1934. This Court should grant review on Certiorari.

Respectfully submitted,

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July 30, 1975

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-166

FIDELITY TELEVISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2213

FIDELITY TELEVISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
RKO GENERAL, INC., INTERVENOR

Appeal from the Federal Communications Commission

Decided March 6, 1975

Walter H. Sweeney, with whom *Edward P. Morgan* was on the brief, for appellant.

Joseph A. Marino, Associate General Counsel, Federal Communications Commission, with whom *Ashton R. Hardy*, General Counsel, and *Joseph Volpe III*, Counsel, were on the brief for appellee. *John W. Pettit*, General Counsel, Federal Communications Commission at the time the record was filed, also entered an appearance for appellee.

Harold David Cohn, with whom *John J. Duffy* was on the brief for intervenor, RKO General, Inc. *J. Laurent*

Scharff also entered an appearance for intervenor RKO, General, Inc.

Before: LEVENTHAL and ROBB, *Circuit Judges*, and DAVIS *, *Judge*, United States Court of Claims.

Opinion for the Court filed by *Judge* DAVIS.

DAVIS, *Judge*: Nearly ten years ago, intervenor RKO General, Inc. filed an application for a three-year renewal of its license to operate KHJ-TV, Channel 9 in Los Angeles. Thus began a long saga which we may not even end today by affirming the Commission's decision in favor of RKO.[1]

I

RKO, a wholly-owned subsidiary of General Tire and Rubber Company, has operated KHJ since 1951. Joint Appendix at 52. Under the Federal Communications Commission's license-renewal scheme, *see* 47 C.F.R. § 73.630 (1965), this license came up for three-year renewal with those of other California licensees in 1965, and RKO filed an application for renewal on August 31, 1965. Two months later, on October 25, 1965, appellant Fidelity Television, Inc. filed an application for a construction permit to build a station at Norwalk, California, also to operate on Channel 9 and to blanket the same area.[2] As applications for mutually exclusive sta-

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

[1] Under the "holdover" provisions of the Federal Communications Act and the Commission's rules, RKO has been operating the station in the interim. 47 U.S.C. § 307(d) (1970); 47 C.F.R. § 1.62(a)(1) (1973). The history of this case emphasizing the interplay of decisions by the F.C.C. and this court is set out in our earlier decision in *Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443 (D.C. Cir. 1974).

[2] A construction permit is a necessary prerequisite to the licensing of a new station, and except in rare cases, it is also

tions, the requests of RKO and Fidelity were designated for a comparative hearing by the Commission on June 8, 1966. Joint Appendix at 1-2; *see Ashbacker Radio Co. v. F.C.C.*, 326 U.S. 327, 333 (1945). In setting the applications for a comparative hearing, the Commission, as was its practice, limited the questions to be considered to the so-called "standard comparative issues," *i.e.*, which of the proposals would better serve the public interest, and which of the applications should be granted. These standard issues did not include programming and certain other factors.[3]

---

a guarantee of a licensee to operate the station once constructed. 47 U.S.C. § 319 (1970); 47 C.F.R. § 1.68 (1973). While Channel 9 is allocated to Los Angeles under the Commission's overall television allocation scheme, 47 C.F.R. § 73.606 (1973), Commission rules permit a licensee to operate the station from anywhere within 15 miles of the city of license. 47 C.F.R. § 73.607(b) (1973). Norwalk is within 15 miles of Los Angeles.

Fidelity proposed to construct the station at Norwalk because it wished to orient programming of the channel to the "Southland," an area described in Fidelity's Petition to Enlarge Issues as the area in Los Angeles County lying to the south and east of the city and Orange County. Joint Appendix at 198.

[3] The theory of the standard comparative issue is that the Commission determines before setting the case for a hearing that each applicant has the minimum character, legal, financial, and technical capability to operate the station in the public interest. The purpose of the comparative hearing is to determine, on that basis, which would serve the public interest better. *See* Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 33-34 (1971) [cited as Anthony]. Under this theory, an applicant's ability to produce the programming set out on his application is considered a non-comparative financial issue, and is not ordinarily deemed relevant in the comparative proceeding. *See McClatchy Broadcasting Co.*, 19 F.C.C. 343, 375 (1954); *National Broadcasting Co.*, 21 F.C.C.2d 611, 625-27 (1970).

The Commission's rules provide, however, that an applicant might petition the Review Board for an enlargement of the issues so that evidence could be presented on, *e.g.*, character or programming. *See* 47 C.F.R. § 1.229 (1973). Fidelity, on June 27, 1966, filed such a petition, requesting the addition of three issues: which applicant would provide for a more fair, efficient and equitable distribution of television services; the "service philosophy" of each applicant;[4] and the significant differences in programming proposed by each applicant. Joint Appendix at 44. The F.C.C.'s Review Board denied Fidelity's petition on October 27, 1966, and the Commission then rejected Fidelity's application for review of the Board's order on December 29, 1966. *Ibid.* at 161-63. The comparative hearing on the two proposals, on the standard comparative issue only, opened on February 27, 1967, and the record was closed for the first time on June 15, 1967. *Ibid.* at 45.

This proceeding did not, however, simply run its ordinary course through the hearing examiner[5] and the Commission after the hearing opened. On March 6, 1967, the Commission released a decision in *Chapman Radio & Television Co.*, a four-sided comparative proceeding for assignment of a new television station in Homewood, Alabama. 7 F.C.C.2d 213 (1967). One of the competitors had requested the addition of a programming issue, and the Review Board had denied the request. The Com-

[4] The "service philosophy" issue deals with an applicant's intention to direct his programming to, or primarily to, only a part of the area to which his signal reaches. *See Central Coast Television*, 35 F.C.C. 259 (1963); *Petersburg Television Corp.*, 19 F.C.C. 451 (1954).

[5] The title of hearing examiner was changed to Administrative Law Judge effective September 6, 1972. 37 Fed. Reg. 18034 (1972). Since all decisions in this case at levels below the Commission itself had been made before 1972, the title "hearing examiner" will be used in this opinion.

mission took the opportunity to clarify the relationship between its general policy and the incorporation of a programing issue, stating that "a proponent of the programing issue should be required to make a prima facie showing that there are significant differences in the programing proposed and should relate his claimed substantial superiority in program planning to his ascertainment of community needs." 7 F.C.C.2d at 215. *Chapman* was then remanded to the Review Board to consider whether a programing issue should be added under the clarified standard. *Ibid.*

On March 9, 1967, Fidelity filed a petition with the Commission requesting that it itself add programming and needs-ascertainment[6] issues on the basis of *Chapman*, or that it remand to the Review Board for reconsideration in the light of *Chapman*. This application was denied on July 12, 1967, on the ground that Fidelity had not offered any new data and the data on which it had originally relied did not amount to the "*prima facie* showing" required under *Chapman*. Joint Appendix at 171-75. Fidelity then filed a further petition for clarifica-

[6] A "needs ascertainment" issue relates to the manner and quality of an applicant's efforts to discover community needs, as required by the Commission *En Banc* Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) and Section IV of FCC Form 301, Application for Authority to Construct a New Broadcast Station, etc. The standards for sufficient needs-ascertainment were substantially upgraded effective January 1, 1967 for television license renewals, after the renewal application at issue here was filed, and again in 1971. *See* Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314, and 315, 5 F.C.C.2d 175, 181 (1966); Primer on Ascertainment of Community Problems by Broadcast Applicants, etc. 27 F.C.C.2d 650 (1971). *Compare Saul M. Miller*, 4 F.C.C.2d 150 (1966) *with Minshall Broadcasting Co.*, 11 F.C.C.2d 796, 797 (1968), *and Pleasant Broadcasting Co.*, 40 F.C.C.2d 582, 585-86 (1973), *aff'd*, 504 F.2d 271 (D.C. Cir. 1974).

tion with the Review Board, seeking to ascertain that tribunal's position on whether it had in effect applied the *Chapman* standards initially. This was denied on September 22, 1967. *Ibid.* at 176-79.

Concurrently, on March 2, 1967, the Department of Justice filed suit in the United States District Court for the Northern District of Ohio against the General Tire and Rubber Company, Aerojet-General Corporation, A. M. Byers Company, and RKO General, Incorporated (the latter three companies were subsidiaries of General Tire). *United States v. General Tire & Rubber Co.*, No. C-67-155 (N.D. Ohio, filed Mar. 2, 1967). This action alleged that the four companies had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, in that they had, among other things, engaged "in a combination and conspiracy to utilize reciprocity whereby the purchasing power of all of said defendants is used to coerce and persuade certain actual and potential suppliers of the defendants to purchase tires, wrought iron products, advertising time and other products and services from said defendants, in unreasonable restraint of . . . trade and commerce; . . ." Complaint at 6, *United States v. General Tire & Rubber Co., supra.*

Responding to this new development, Fidelity filed with the Review Board, on March 8, 1967, a petition to enlarge the issues to be considered at the comparative hearing to include a determination

> in light of all the facts and circumstances surrounding the Complaint filed by the United States of America on March 2, 1967, against General Tire and Rubber Company, . . . whether RKO General, Inc., is qualified to be a licensee of the facility for which it is applying herein, or alternatively, whether such matters bear upon the comparative qualifications of RKO General, Inc.; . . . [Joint Appendix at 164.]

The Board denied the petition on June 20, 1967, saying that Fidelity's allegations of wrongdoing were not specific enough to warrant the addition of a "disqualifying character issue," but that "relevant facts and circumstances forming bases for the civil suit—particularly as they relate to RKO's broadcast practices—can be adduced by Fidelity under the standard comparative issue." Joint Appendix at 167-68. The Board also said that any grant to RKO would be conditioned on the Commission's right to reopen the case should the outcome of the antitrust suit be unfavorable to RKO.[7] *Ibid.* at 169.

All requests for additional issues having thus been disposed of, the comparative hearing continued on the standard comparative issue only, with Fidelity providing only a "superficial" inquiry into RKO's trade practices. Joint Appendix at 180. The record was, as noted above, closed for the first time on June 15, 1967, and the hearing examiner issued his proposed findings in September, 1967. *Ibid.* On February 9, 1968, however, Fidelity petitioned the examiner to reopen the record to receive newly discovered evidence—depositions taken in the Government's antitrust suit. The hearing examiner reopened the record, but cautioned that "It is not being reopened as a repository for the record in the Ohio anti-trust suit. . . . Petitioner asks that the record

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[7] The antitrust action was concluded by a consent decree, with judgment entered on October 21, 1970. The judgment stated that it was entered without "constituting evidence or admission by any party with respect to any issue of fact or law." Final Judgment at 1, *United States v. General Tire & Rubber Co.* It did, however, restrain General Tire and its subsidiaries, including RKO, from engaging in the practices of reciprocity charged in the complaint. *Ibid.* at 2-5. In its decision in this case, the Commission determined that this outcome was not unfavorable to RKO, and that the Review Board's condition had therefore become "a nullity." Joint Appendix at 5.

be reopened for the purpose of taking evidence on the reciprocal trade practices of RKO. With the caveat that such evidence must be patently germane to RKO's stewardship of KHJ-TV that language is adopted as words limiting the scope of future hearing." Joint Appendix at 181-82.* The record was closed for good on August 26, 1968, and the initial decision of the hearing examiner came down on August 13, 1969.

The examiner's decision, without an overabundance of enthusiasm, recommended that RKO's application for renewal be denied and Fidelity be granted a construction permit to build a station to take over Channel 9. Joint Appendix at 151, 153. He found that General Tire and RKO had substantially contributed to the development of broadcast technology and had the capacity to run a good station. *Ibid.* at 137-41. However, he also found that KHJ's past performance in programming and community relations, particularly in the station's concentration on presenting old films and ignoring community criticism of excessive violence in some of the movies, was poor. *Ibid.* at 143. On the other hand, he gave Fidelity a demerit for an integration-of-ownership-and-management proposal which he felt was created just to win the

* While the petition to reopen the record was pending before the hearing examiner, Fidelity filed on February 19, 1968, a second request with the Review Board for enlargement of the issues to include a determination whether RKO should be disqualified or assessed a demerit because of anticompetitive practices. Joint Appendix at 183-85. The Board denied Fidelity's petition on May 10, 1968. *Ibid.* The Commission's decision on review, released September 9, 1968, found that the hearing examiner's decision to reopen the record had provided Fidelity with the opportunity to submit evidence on RKO's anticompetitive conduct, so that no further relief by way of reopening the record was required. The Commission did, nevertheless, add to the issues to be decided by the examiner whether RKO should be disqualified or assessed a demerit for its trade practices. *Ibid.* at 187.

license and would not be implemented. *Ibid.* at 150-51. Fidelity, however, was found superior in local ownership, in community-needs-ascertainment, and in providing for diversification of ownership of the mass media. *Ibid.* at 149. The examiner berated General Tire's anticompetitive practices, but did not give RKO a special character demerit for them. *Ibid.* at 144-46, 148. Finding "neither applicant is any bargain as a broadcast licensee," the examiner chose to give Fidelity a chance to improve on RKO's performance. *Ibid* at 151, 153.

Soon after the release of this initial decision, another RKO station, WNAC-TV, Boston, came up for renewal. Upon the filing of two other mutually exclusive applications for construction permits, the Commission, on December 11, 1969, designated the three applications for a comparative hearing. *RKO General, Inc. (WNAC-TV)*, FCC 74D-36 at 2 (released June 21, 1974). Included in the hearing order was an "anticompetitive" issue much like that added in the current case after the record was closed. *Ibid.* at 3. On January 8, 1971, the Commission's Broadcast Bureau filed a petition with the Commission asking that the KHJ record be reopened and consolidated with the WNAC record on the anticompetitive issue since the evidence being presented in the latter case was far more complete than that in the present proceeding. *See* Joint Appendix at 5. Fidelity opposed the move, and the Commission's ultimate resolution of the problem was to go ahead with a conditional decision in this KHJ case and to make Fidelity a party in the WNAC proceeding. *RKO General, Inc.*, 31 F.C.C.2d 70 (1971).*

* Fidelity participated in the WNAC hearing through counsel who also represented one of the WNAC challengers. *RKO General, Inc. (WNAC-TV)*, FCC 74D-36 at 1 (released June 21, 1974). The Review Board also added to the WNAC proceeding an issue relating to RKO's candor in its testimony in

The Commission heard oral argument in the KHJ proceeding on October 12, 1971, but as of March 22, 1973, had not yet reached its decision. On that day, Fidelity filed with this court a petition for a writ of mandamus. *Fidelity Television, Inc.* v. *Federal Communications Commission*, No. 73-1313 (D.C. Cir., filed Mar. 22, 1973). On June 11, 1973, the court, while refusing to issue the writ, stated that the Commission's decision had been unreasonably delayed and ordered it to report its progress within 30 days. *Ibid.* The Commission, although it did report on July 6, 1973, had still not issued a decision when, on November 21, 1973, Fidelity renewed its petition here. *Ibid.* On December 6, 1973, before the court could act, the Commission announced its decision. Joint Appendix at 1.[10]

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the KHJ proceeding. *RKO General, Inc.*, 30 F.C.C.2d 138, 144 (1971).

The Department of Justice, meanwhile, filed a brief with the Commission urging disqualification of RKO if the Commission agreed with the facts found by the hearing examiner. Joint Appendix at 320, 348.

[10] After the Commission's decision, Fidelity moved this court to dismiss its petition for a writ of mandamus as moot. The Commission did not oppose the move, and on December 21 this court entered an order dismissing the petition. *Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443, 447 (D.C. Cir. 1974). Fidelity then filed a petition for review of the December 6 order. On February 22, 1974, two months after it had tacitly conceded the finality of the December 6 order by not opposing Fidelity's motion to dismiss the petition for a writ of mandamus, the Commission asked this court to dismiss Fidelity's appeal for lack of jurisdiction, contending that the December 6 order was not a "final order" within the terms of 47 U.S.C. § 402(b)(1) (1970). We rejected that contention in an order issued July 3, 1974 and an opinion of August 2, 1974. *Ibid.*

By a divided vote, the agency reversed the hearing examiner and granted RKO's renewal application.[11] The only expression of majority views was in the opinion joined by Commissioners Robert E. Lee and Reid. The opinion found that KHJ had neither engaged in nor benefited from coercive reciprocity, but had engaged only in mutual patronage reciprocity. However, the Commission concluded, partially on the basis of the widespread nature of the practice, that the injunction entered in the Ohio antitrust suit was sufficient to stop the practice and that RKO should not be denied a license for doing something arguably legal when done. Joint Appendix at 10-11. The opinion also determined that KHJ's past performance in terms of programming and community relations while not "unusually good" or "superior" was not "insubstantial" or "unusually poor."[12] Furthermore, RKO had promised in its 1962 renewal application no more than it had provided. Therefore, the opinion stated, since the "record must be deemed to be within the bounds of average performance expected of all licensees, [it] warrant[s] neither a preference nor a demerit." Joint Appendix at 16.

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[11] There was no opinion subscribed to *in toto* by a majority of the participating members. Commissioners Robert E. Lee and Reid joined in an opinion (Commissioner Reid without hearing oral argument); then Chairman Burch concurred in the result without further statement; Commissioners Johnson and H. Rex Lee dissented in opinions; and Commissioners Wiley and Hooks did not participate. Joint Appendix at 1.

[12] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 398 (1965):

> A past record within the bounds of average performance will be disregarded since average future performance is expected. . . .
>
> We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future.

Going on to diversification, the opinion found that while RKO superficially looked poor in this category (in that the company was the licensee of AM and FM stations in Los Angeles as well as stations in other states and was a shareholder in several cable television systems), each station was operated independently and, particularly in the case of KHJ, was one of many media outlets in its market. Finding that the dangers of non-diversification, which it characterized as promotion of "any national or other uniform expression of political, economic, or social opinion," did not exist in this case, the opinion concluded that "we are not persuaded that the nature of RKO's interests is such as to have any adverse effect on the flow of information for the audience to be served here." Joint Appendix at 17. The opinion also found that, since a Fidelity stockholder owned an interest in several suburban Los Angeles newspapers, the challenger was not entirely free of diversification problems. Finally, noting ongoing rulemaking proceedings on the application of the diversification criterion to renewal applicants, including a proposed rule requiring divestiture, the opinion concluded that "neither applicant has made a sufficient showing to warrant the award of any preference under the diversification criterion." *Ibid.*

On the subject of integration, for which the hearing examiner had given Fidelity a demerit, the opinion found the two applicants equal. It said that Fidelity's conduct as an applicant had indicated that "the record here gives little promise that Fidelity will effectively implement its paper integration promises." Joint Appendix at 20. On the other hand, RKO was found to have achieved the purposes of integration—local control and accountability—through its policy of station independence, and by requiring active participation in community affairs by station employees. *Ibid.*

Finding the two applicants thus equal on the standard comparative factors, the opinion based the ultimate outcome on a policy decision that "credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service." *Ibid.* at 22. This was found to have tipped the balance in RKO's favor, and the license was therefore renewed—conditional with respect to anticompetitive practices on the final outcome of the WNAC proceeding.[13]

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[13] We do not now have before us the Commission's decision in the WNAC case, which has not yet issued. That decision and the agency's interpretation of it in deciding whether to revoke RKO's license for KHJ will of course constitute an appealable order of the Commission, which may then be appealed by either Fidelity or RKO. The fact that the ultimate decision of the Commission will be an appealable final order does not, as we stated in our earlier decision, detract from our jurisdiction in the present case. 502 F.2d at 452.

Commissioner Johnson dissented from the decision, calling it "the worst decision of this Commission during my term of seven years and five months." Joint Appendix at 29. He objected to the decision on four grounds: (1) that RKO's anticompetitive conduct should disqualify it as a licensee; (2) that RKO's broadcast record was less than mediocre and the fact that they had promised no more was irrelevant; (3) that Fidelity was clearly superior in integration, local ownership, and diversity, characteristics which the Commission had often held absolutely to be plus factors, and (4) that Fidelity should have been able to adduce evidence on its proposed programming. *Ibid.* at 30-33.

Commissioner H. Rex Lee also dissented, largely because he thought that RKO's anticompetitive conduct should totally disqualify the company. Commissioner Lee, while not disagreeing with Commissioner Johnson's assessment of Fidelity's virtues on the traditional criteria, stated that if the Commission chose to disregard these criteria in a renewal proceeding, it should at least follow a recent precedent and decide the case on past performance, which Commissioner Lee found "insubstantial." Joint Appendix at 34-42; *see A.H. Belo Corp.*, 40 F.C.C.2d 1131 (1973).

II

Before considering the validity of the Commission's ultimate decision under the applicable standards, it is necessary to consider some procedural and preliminary points pressed upon us by appellant.

First, Fidelity has argued (Brief for Appellant at 37-42) that this court should overturn the Commission's decision or at least disqualify then Chairman Burch on the grounds that "the decision in this case is nothing more than an extension of the Commission's operational bias in favor of incumbent licensees." Brief for Appellant at 42. This bias has, appellant claims, been revealed in prior decisions of the Commission and in Chairman Burch's testimony before Congress. The claim is almost exactly the same as that made and rejected in *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 700-02 (1948), and we find that case controlling.

Next, Fidelity charges that the Commission's ultimate decision was fatally defective because it was based on a record limited by the Commission's earlier, allegedly improper, decisions to restrict the hearing to the "standard comparative issue." At various points in the proceeding, Fidelity unsuccessfully sought the addition of five issues—distribution of services (the so-called 307(b) issue), service philosophy, programming, needs ascertainment, and anticompetitive conduct. We consider each of these rulings of the Commission in turn.

Section 307(b) of the Communications Act, 47 U.S.C. § 307(b) (1970), requires the F.C.C. "to provide a fair, efficient, and equitable distribution" of television service to the communities of the United States. Fidelity contends that "the Southland," which it describes as Orange County and the communities to the south and east of Los Angeles, Joint Appendix at 198, is a community without television service but which deserves it under section

307(b). This is not technically a comparative issue, since if Fidelity were right then appellant, meeting the minimum requirements, could receive the license regardless of the merits of RKO's operation of KHJ. *See* Anthony, *supra* note 3 at 85-87. However, a "307(b) issue" is, when properly raised, added to the comparative hearing order and considered as part of the comparative hearing. *See, e.g., Southern Tier Radio Service, Inc.*, 19 F.C.C. 496 (1954); *St. Louis Telecast, Inc.*, 22 F.C.C. 625 (1957).

The Commission denied Fidelity's request for addition of a 307(b) issue because Fidelity had failed to make the necessary first showing that "the Southland" was a community, let alone a separate community in need of television service. Joint Appendix at 160. The Commission's decision cannot be overturned. In failing to define the Southland with greater specificity, Fidelity rendered its request facially insufficient under the standards previously announced. In *Southern Tier Radio Service, Inc.*, *supra*, § 307(b) was held not to be relevant because the applicant was unable to define with precision "Greater Endicott." 19 F.C.C. at 551. When Fidelity failed even to list the political units which make up "the Southland," the Commission was justified in rejecting the request as facially insufficient. *Cf. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The Commission also found that Fidelity had not presented a prima facie showing that Norwalk, the one clearly identified community, was "significantly independent of Los Angeles from the economic and cultural standpoint," noting that Fidelity had based its proposed advertising revenues on the entire Los Angeles market. Joint Appendix at 159-60. There is no sound basis for questioning this factual determination; this court has previously affirmed a finding that a suburb only slightly closer to Los Angeles than Norwalk was not a separate community. *Huntington*

Broadcast Co. v. *F.C.C.*, 192 F.2d 33 (D.C. Cir. 1951), *aff'g Huntington Broadcast Co.*, 14 F.C.C. 563 (1950). *See also St. Louis Telecast, Inc.*, 22 F.C.C. 625, 712-14 (1957).

As part of the same petition, Fidelity asked the Commission to add a "service philosophy" issue. That concept, as we have noted, is a term of art used to describe an applicant's intention to direct its programming only or primarily to a part of the area to be covered by a station's signal. The Commission found that Fidelity fits directly into the mold developed in *Petersburg Television Corp.*, 19 F.C.C. 451 (1954)—that appellant had surveyed only three Los Angeles residents and could therefore be found to have ignored the actual city of license in its planning. 19 F.C.C. at 464-65, 475; *see* Joint Appendix at 160. The Commission's decision is factually accurate, *see* Joint Appendix at 199, and based on the *Petersburg* standard Fidelity could legitimately have been given a demerit for "service philosophy." The decision not to add the issue to the comparative hearing was not only harmless but probably favorable to Fidelity.[14]

Another additional issue rejected by the F.C.C. was programming. Prior to the 1965 Policy Statement, 1 F.C.C.2d 393 (1965), the proposed programming of the competitors was compared and the ruling on this criterion formed an important part of the ultimate determination of who received the license. *See* Jaffe, WHDH: *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1695 (1969). In the agency's view, this resulted in paper battles with little assurance that the winner would actually produce the programming forecast; the issue was deemed especially unfair when a renewal applicant, who had to run on his record, was pitted against

[14] The hearing examiner's decision indicates that he would have found against Fidelity on a "service philosphy" issue Joint Appendix at 149.

a challenger who could promise any type of programming the Commission favored. *Ibid.* The 1965 Policy Statement put an end to this practice by requiring that a programming issue be separately designated and by stating that it would be allowed only "to the extent [programming differences] go beyond ordinary differences in judgment and show a superior devotion to public service." 1 F.C.C.2d at 397. The Commission also made clear that percentage differences, even with regard to the highly favored category of local programming, must be based on ascertained community needs in order to justify the addition of a programming issue. *Ibid.*

Fidelity requested that the Commission add a programming issue because of its emphasis on local programming and the "marked differences in the percentages which the applicants propose to devote to the various program categories." Joint Appendix at 205. The Commission refused on two grounds—that the program differences were mere differences in judgment and that Fidelity had not done an adequate needs survey to justify the insertion of the issue on the basis of "superior devotion to public service." *Ibid.* at 161. If the agency's decision had been based only on the first ground, it might well be questionable. Fidelity offered 22% less entertainment and twice as much educational and news programming as RKO. *Ibid.* at 205-06. These differences exceed those on which an issue was allowed in *WPIX, Inc.*, 23 F.C.C. 2d 245, 256, 259 (1970), and on which the Review Board was requested to reconsider in *Chapman Radio & Television Co.*, 7 F.C.C.2d 213 (1967).[15] However, the Commission also found that the needs-ascertainment survey

[15] *See* F.C.C. Forms 301, Statement of Program Service, Proposed Operation in Birmingham Broadcasting Co., Dkt #16761; Alabama Television, Inc., Dkt #16760; Birmingham Television Corp., Dkt #16758; Chapman Radio & Television Co., Dkt #15461.

Fidelity made, which was basically limited to the "Southland," did not provide an adequate basis on which to decide whether the appellant's programming differences were really related to the needs of the entire service area (which of course included Los Angeles). Fidelity understood the Commission's position that a programming issue depended on three factors—differences in programming, adequate needs ascertainment of the area covered by the license, and relation of the needs to the proposed programs. Joint Appendix at 206. In choosing to orient its surveys only to one part of the service area, Fidelity took the risk that if it did not win on the 307 (b) issue, *supra*—as it did not—the Commission could find that it had inadequately surveyed the needs of its area. Knowing this, Fidelity cannot now complain that it lost its bet.[16]

Fidelity's attempt to have a separate needs-ascertainment issue added requires little discussion. Commission rules provide (and have so provided since 1963) that a motion for enlargement of issues must be filed within 15 days after the notice of issues scheduled for the hearing is published in the Federal Register. 47 C.F.R. § 1.229 (b) (1973). The Federal Register notice in this case was published on June 11, 1966, 31 Fed. Reg. 8253 (1966), so that the time to file a petition to enlarge ran

[16] Fidelity also maintains that it was error for the Commission to remand *Chapman* to the Review Board to allow Alabama Television, Inc., one of the competitors in that case, to show that its programming differences were related to the needs ascertained. *See* pp. 4-6, *supra*. The difference between *Chapman* and this case is that Alabama Television had done an adequate survey but had not shown how the ascertained needs matched the proposed programming. Here, the Commission found that Fidelity was missing one of the primary requirements, a proper survey, and therefore that no explanation by Fidelity could show how its programming met unknown needs.

out on Monday, June 27, 1966. The Review Board found that Fidelity had not shown that the petition filed July 24, 1967 could not have been filed in time, Joint Appendix at 178, and Fidelity did not appeal the Board's ruling to the Commission. Fidelity having failed to exhaust its administrative remedies on this issue, the Review Board's determination is not properly before this court. *Cf. Pine v. United States*, 371 F.2d 466, 467-68 (Ct. Cl. 1967).

Finally, we take up Fidelity's request to have an issue relating to RKO's anticompetitive conduct added to the hearing. While the Commission eventually did add such an issue, Joint Appendix at 187, it acted rather late and on a limited basis, and Fidelity argues that therefore it was not able to produce an adequate record on the subject. Appellant's Brief at 19. The background has already been touched on in Part I, *supra*. Borrowing from the Justice Department's suit against General Tire, Fidelity charged that RKO, through its parent General Tire, had engaged in "reciprocity," the practice of obtaining sales by conditioning purchases on future orders. The challenge was in essence that KHJ, because of its place in the General Tire structure, automatically received advertising without competing with other Los Angeles stations. If proven, the anticompetitive effect on other stations would be obvious. Reciprocity is especially complex in a conglomerate like General Tire because its needs and products are diverse; for example, rubber purchases can be conditioned on advertising sales. Fidelity argues that, for this reason, it was necessary for it to be able to present evidence on reciprocity in the entire General Tire organization, and not simply that which was "patently germane to RKO's stewardship of KHJ-TV," as required by the hearing examiner. Appellant's Brief at 17-20; *see* Joint Appendix at 182.

Given the nature of the charges, including the allegation of direct involvement by RKO and not merely

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General Tire, *see* Complaint at 7, *United States v. General Tire & Rubber Co.*, *supra*, it seems that the Commission could well have granted Fidelity's initial request to enlarge the issues to include anticompetitive conduct. But the error proved harmless. By the time this case reached this court, Fidelity had managed to create a fairly substantial record in this proceeding on the reciprocity practices of RKO, not merely in its operation of KHJ, but throughout the entire broadcast side of its business. Furthermore, Fidelity also participated in the more intensive hearing on General Tire's anticompetitive conduct as part of the WNAC renewal proceeding. *See* Part I, *supra*. The renewal of RKO's license for KHJ was expressly made subject to the ultimate determination in the WNAC case. A full record on the anticompetitive issue has thus been compiled, and it will be available for consideration with respect to KHJ after the Commission makes its final decision on the status of RKO's license based on the outcome of the WNAC proceeding.

III

It will be helpful to consider separately one other matter before coming directly to the agency's decision on the actual comparison of Fidelity and RKO. Before a comparative hearing can be held, or at least before the winner can receive a license, it is necessary for the Commission to determine that the applicant meets "the citizenship, character, and financial, technical, and other qualifications" the F.C.C. prescribes. *See* 47 U.S.C. § 308 (b) (1970); Anthony, *supra* note 3 at 34. In this case, there was serious objection on the character issue only as it related to RKO's alleged anticompetitive conduct.[17]

[17] RKO and the Broadcast Bureau also filed petitions questioning Fidelity's character, but the Commission refused to conduct hearings on those allegations. Joint Appendix at 188-94.

The basic nature of the charge and the procedural problems have been discussed in Part II, *supra*. Here we assess the validity of the Commission's determination, on the basis of the record in this proceeding,[18] to disqualify or grant a demerit to RKO because of the trade relations practices of General Tire.[19]

The antitrust law on reciprocity is not entirely settled. The practice of explicitly and successfully conditioning orders for supplies on the supplier's purchase of products from the buyer has been held to be a violation of at least Section 5 of the Federal Trade Commission Act since the 1930's.[20] Also, the opportunity for such practices which might arise from a merger can result in the merger's constituting a Clayton Act section 7 violation.[21] When no merger is involved, and in particular where it is not clear that attempts to induce sales through purchases are successful, the controlling rule is less plain.[22]

[18] The bearing of the WNAC record on this issue is left for future determination (if the problem should be raised).

[19] Character is both a non-comparative and a comparative consideration. While the Commission can disqualify a party entirely on the basis of poor character, it has also retained the option to use lesser character blemishes as demerits in a comparative proceeding. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 399 (1965).

[20] 15 U.S.C. § 45 (1970) (Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914)); *see Waugh Equipment Co.*, 15 F.T.C. 232 (1931); *California Packing Corp.*, 25 F.T.C. 379 (1937).

[21] 15 U.S.C. § 18 (1970) (Section 7 of the Clayton Act, 38 Stat. 731 (1914)); *see F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592, 594-95 (1965).

[22] *See generally United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966). *See also Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

The evidence in this case largely shows, as the agency opinion found, ineffective attempts at reciprocity, particularly with respect to KHJ.[23] Joint Appendix at 10-11. At best, there is doubt whether unilateral, unsuccessful attempts at reciprocity constitute an antitrust violation. *See* Kintner, *The Anatomy of Reciprocity*, 56 A.B.A.J. 232, 233 (1970). In the *General Dynamics* case, so far the most expansive on the subject, only successfully completed efforts were considered by the court in determining whether the Sherman Act had been violated, 258 F. Supp. at 66. We do not think that the F.C.C. is required to go further than the courts—particularly with respect to an earlier period in which the law and the general practice were even less clear than today. *See infra.*[24]

There are also instances in the record of successful reciprocity. Most of these have little to do with RKO, and even less with KHJ, whose ratings at times were so poor that, even with the added push of reciprocity, no

[23] As indicated above, there was disagreement whether evidence relating to General's reciprocity practices, but not to RKO's or KHJ's involvement in them, should have been admitted. We think it clear that if all General Tire divisions except RKO had been involved in reciprocity, there would be no sufficient basis for a demerit in this broadcast license proceeding. While the entire corporate practice is relevant, this record shows that RKO's role was substantially less than that of General's other divisions.

[24] While it is clear that the F.C.C. may take account of anticompetitive actions short of antitrust violations, *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943), it is certainly not clear that, in the absence of an actual conviction, it must disqualify or downgrade on such a basis. The presence of a statutory provision which explicitly grants a court the option of requiring revocation of a license on conviction of an antitrust violation suggests that the Commission retains the option to do less when no conviction is involved. See 47 U.S.C. § 313(a) (1970).

advertising was received. Joint Appendix at 122-26, 132-35. In addition, as was typical following the coercive reciprocity cases of the 1930s, it appears that the reciprocity shown in this record was considered mutually beneficial by both companies, and that although purchases might in some cases be rerouted in response to reduced sales, General did not attempt to use coercion as an inducement.

Contemporary sources indicate that this type of noncoercive reciprocity was extremely widespread in the early 1960s, but more recent writings suggest that it has largely been abandoned in recent years. *See* Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433, 435 (1963); Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873, 874 (1964). *Compare* Kintner, *The Anatomy of Reciprocity*, 56 A.B.A.J. 232, 233 (1970). The practice was not affirmatively declared illegal until the 1966 *General Dynamics* case, 258 F. Supp. at 66, and even there the merger context might have accounted for the ruling.[25] General Tire has been since 1970 under a consent decree which prevents it from engaging in most sorts of reciprocal trade relations. In these circumstances, and remembering that KHJ was only a small part of what went on and that antitrust considerations are only one segment of the Commission's concern with the character of a broadcast applicant, we find that the F.C.C. did not act arbitrarily, capriciously, or illegally in refusing to give RKO a demerit or to dis-

[25] In addition, a strict reading of *General Dynamics* would be that all discussion of reciprocity as a Sherman Act violation is dictum since the court found that an insubstantial volume of commerce had been affected. 258 F. Supp. at 66-67.

qualify it for the reciprocity practices outlined in this record.[26]

IV

We come now to our final task—scrutiny of the F.C.C.'s ultimate decision in the light of the standards for comparative renewal hearings developed by the agency in the past.[27] In reviewing the F.C.C.'s decision, particularly

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[26] As we have stressed, under the Commission's decision the agency's ruling on anticompetitive practices is subject to reopening in the light of the WNAC proceedings (which have not yet been finally determined by the Commission).

[27] We are not required, for present purposes, to deal with the criticisms leveled in recent years against the comparative hearing process, especially as it involves renewal applicants. *See, e.g., Anthony, supra* note 3; Goldin, *"Spare the Golden Goose"—The Aftermath of* WHDH *in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055 (1962); Grunewald, *Should the Comparative Hearing Process be Retained in Television Licensing?*, 13 AM. U.L. REV. 164 (1964); Comment, *The FCC and Broadcasting License Renewals: Perspectives on* WHDH, 36 U. CHI. L. REV. 854 (1969).

The 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), which sets out comparative criteria for most comparative hearings, by its own terms "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." *Ibid.* at 393 n.1. While the F.C.C. held soon after the 1965 statement was issued that the statement would govern the introduction of evidence in a renewal comparative proceeding, *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597, 1598-99 (1965), it was not until 1970 that the Commission attempted to delineate explicitly the standards which would apply in a comparative renewal proceeding. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). The 1970 Policy Statement, however, operated to deny challengers a full comparative hearing, and it was vacated by this court as contrary to the Communications Act and the *Ash-*

under the broad mandate given that agency—that it shall grant a license "if public convenience, interest, or necessity will be served thereby," 47 U.S.C. § 307(a) (1970)—our function is, as has often been repeated, a limited one. It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority,[28] that it has followed its own procedural rules and regulations,[29] that its findings of fact are reasonably articulated and based on substantial evidence in the record as a whole,[30] that its conclusions do not deviate greatly from past pronouncements without sufficient explanation,[31] and that in general it has engaged in reasoned decision-making.[32]

The two basic features of the present system as the Commission has developed it are that a renewal applicant will be judged on his past record, and that the so-called traditional comparative factors are largely predictors of the kind of service a new applicant would offer

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backer doctrine. *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1214 (D.C. Cir. 1971). The Commission thereupon undertook to develop a new set of standards for renewal applicants, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 F.C.C.2d 580 (1971), but this inquiry has not yet resulted in a new policy statement.

[28] *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 351, 356 (D.C. Cir. 1949).

[29] *Service v. Dulles*, 354 U.S. 363, 388 (1957).

[30] *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 595 (1945); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487-88 (1951).

[31] *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[32] *See generally Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

and not requirements for being a good licensee.[33] It is not our function to approve or disapprove this framework if it falls, as it does, within the agency's authority. As we have said before,[34] and as the F.C.C.'s oversight committees in Congress have recently reiterated,[35] the comparative hearing process might well come much closer to producing licensees who act in the public interest if standards of "substantial service" in programming and other areas were developed either by the FCC directly or through stricter rules for ascertainment of community needs, and if licensees were required to follow them or run the risk of non-renewal.[36] But we reiterate that it is not our judicial job to direct the Commission on how to run the comparative hearing process, beyond assuring that the administrative process respects the rights of the public and of competitors assured under the Communications Act and the *Ashbacker* doctrine, and that it produces rational decisions based on factors generally known in advance.

We consider first the Commission's finding that RKO's performance was "average" and not "poor" as the hear-

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[33] *See A.H. Belo Corp.*, 40 F.C.C.2d 1131, 1133 (1973); *Moline Television Corp.*, 31 F.C.C.2d 263, 269, 273-74 (1971).

[34] *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971); *see Citizens Committee to Save WEFM v. F.C.C.*, 506 F.2d 246, 267-68 (D.C. Cir., 1974).

[35] *Broadcast License Renewal Act*, H. REP. No. 93-961, 93d Cong., 2d Sess. 16-17 (1974); *Broadcast License Renewal Act*, S. REP. No. 93-1190, 93d Cong., 2d Sess. 10 (1974).

[36] *See* Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 430 (1970). The hearing examiner in this case expressed the belief that if standards had been available RKO would have met them. Joint Appendix at 152.

ing examiner had found.[37] If the performance was poor, then by the Commission's own standards, RKO would have been almost out of the running.[38] While the examiner's decision is an important part of the record before this court, particularly where he is overturned on an inference from facts accepted by the Commission, "it is the agency's function, not the examiner's, to make . . . the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971). The record shows that KHJ's programming during the license period was largely oriented to the showing of feature films, usually interrupted by a substantial number of commercials. Joint Appendix at 72-81. On the other hand, the record also shows that RKO was the first licensee in the country to obtain a substantial film library and to make these movies available to the television audience. *Ibid.* at 51. While some films engendered substantial criticism for excessive violence, many of the movies "claim excellence" and the large

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[37] It was not until its 1970 Policy Statement that the Commission made it clear that only a licensee's performance during the license period, and not any effort made to upgrade the station after a challenge was filed, would be taken into account on renewal. 22 F.C.C.2d at 427. This overruled the practice of considering post-term changes in a later comparative hearing. *See Hearst Radio, Inc.*, 15 F.C.C. 1149 (1951).

It is, however, inappropriate to compare KHJ's pre-1967 performance with 1971 standards, as one of the dissenters did in this case. Joint Appendix at 38. In fact, KHJ's recent performance in non-entertainment programming can be said to have placed it among the top stations in the country in terms of the percentage of the broadcast day spent on news, public affairs, and local programming. F.C.C. News Release No. 31512, Oct. 8, 1974 at 118, 220.

[38] 22 F.C.C.2d at 428 n.4.

bulk were inoffensive. *Ibid.* at 60. In addition, RKO did present, at a substantial expenditure of money, some other entertainment programs which enriched the Los Angeles television scene. *Ibid.* at 60-61. In the non-entertainment category where RKO had not promised much,[39] the showing was similarly mixed. News coverage, for example, even for the 1962-65 era of 15-minute national news, was not overabundant, but on the other hand the station did present a certain amount of coverage of Los Angeles City Council hearings. *Ibid.* at 64-65. On an absolute basis, it might be difficult for all of us, if we were regulators, to characterize KHJ's past performance as "superior," entitling it to "a plus of major significance," [40] but as judges we are agreed that we cannot, on the record as a whole, say that the Commission's decision that programming performance was "average" is bereft of the support of substantial evidence.

Having decided that RKO's programming performance was only "average," the Commission had to go on to the other traditional criteria, comparing Fidelity's predicted success in achieving the goals of integration, local ownership, and diversification with RKO's actual performance in those areas.

As we noted above, the examiner, but not the Commission, gave Fidelity a demerit for its integration proposal. The agency's reversal of the hearing examiner on this point was more apparent than real, since both felt that the proposal, while on paper all that the Commission could have wanted, had extremely little chance

[39] There is no issue of promise versus performance in this case as there was in *Moline Television Corp.*, 31 F.C.C.2d 263 (1971). As the hearing examiner found, RKO's performance matched its promises almost exactly. Joint Appendix at 58-59.

[40] *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 (D.C. Cir. 1971).

of being implemented. Joint Appendix at 150-51, 18-20. The examiner's decision was presumably based on his observation of Fidelity's witnesses and on his opportunity to discern the character of Fidelity's owners and their ability to perform. This is precisely the type of examiner's decision which must be given the most weight by the agency, and the Commission's ultimate decision on this point, which in effect agreed with that of the hearing examiner, can stand on the record the hearing examiner created. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951).

On RKO's behalf, the Commission found that, through the company's policy which "requires the management of its stations to involve themselves in a wide range of community and civic organizations and to use the information gained from such contacts to help determine the direction and programming of the station," RKO's management had acquired the kind of interest in local affairs which made the station responsive to the community—the ultimate goal of the integration and local ownership criteria. Joint Appendix at 20. The examiner's decision shows that KHJ's supervising personnel were long-time residents, including natives, of the Los Angeles area, and were active in a wide variety of civic associations both locally and nationally. Joint Appendix at 55-56. The record also shows more formal efforts to ascertain community needs, as well as the results of these efforts in KHJ's programming. *Ibid.* at 57-58.[41] While we can-

[41] While the hearing examiner found that "the most solid preference that Fidelity enjoys stems from the fact that its proposal is backed by a comprehensive sampling of public opinion," that sample was oriented almost entirely to "the Southland," and was found by the examiner "to further contribute to the city of Los Angeles' becoming the hole in the doughnut of its surrounding communities." Joint Appendix at 149. Furthermore, the affidavits provided by Fidelity to support its claim that its programming was community-

not say that RKO's local interest performance was any better than Fidelity's could be predicted to be on the basis of the challenger's integration proposal, we also cannot properly overrule the Commission's finding that it was no worse. *Ibid.* at 20-21.

With respect to diversification, it was apparent on this record that Fidelity had far fewer media interests than did RKO [42] and that if diversification in its quantitative form were the basis of comparison, Fidelity should have been preferred on this point. Joint Appendix at 149. However, in a renewal hearing, or in a standard comparative hearing where one applicant is the licensee of other stations, the Commission has on occasion considered whether the licensee has in the past met the goals of diversification by operating his stations autonomously and independently. *See McClatchy Broadcasting Co.*, 19 F.C.C. 343, 380-81 (1954). *But cf. Chronicle Broadcasting Co.*, 18 F.C.C. 2d 120, 123 n. 9 (1969). In addition, the number of other outlets for diverse views in the market is an important consideration in weighing the need for a new organization to receive the license. *See Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 859-60 (D.C.

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induced were of the "here's our schedule-don't you like it" variety which the Commission now considers unacceptable. Joint Appendix at 208-12; *see* Ascertainment of Community Needs by Broadcast Applicants, 13 P&F RADIO REG 2D 1903, 1904 (1968).

[42] The agency's opinion used the ownership by one of Fidelity's minor stockholders of a substantial interest in suburban Los Angeles newspapers to diminish Fidelity's rating on diversification. Joint Appendix at 17. Fidelity contends, however, that the newspapers were mere advertising throwaways which cannot be considered media interests. Appellant's Reply Brief at 37. This is one of the charges on which no hearing was held; it should not have been used at all by the Commission. The error, however, was minor and, in our view, did not control or significantly affect the outcome.

Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *City of Camden*, 18 F.C.C.2d 412, 422 n. 22 (1969). Here, both the Commission and the examiner found that KHJ was operated independently of control from the national office of RKO or General Tire, except in broad policy areas. Joint Appendix at 17, 57. While the examiner's report shows some headquarters supervision, particularly in making sure that local stations live up to their promises to the F.C.C., *ibid.* at 52-53, there is nowhere near enough evidence in the record for us to require the Commission to come to any other conclusion on station autonomy. There is also substantial evidence to support the Commission's findings that there is sufficient opportunity to present diverse views through the area's 126 radio stations, 12 commercial television stations [43] and 350 newspapers, including two general circulation dailies. Though the Commission has vacillated over the years in its general approach to diversification, its determination in this case was not in direct conflict with any rule or any policy as enunciated in prior decisions, and we cannot say that the approach here was an unreasonable or unlawful application of the existing diversification principles to this renewal case.

On the whole it is fair to say that the Commission found that the ultimate effect of its analysis of the record was that Fidelity and RKO were essentially equally poor contenders—or, at the best, both were minimally acceptable applicants. While the agency was under no obligation to give the license to either competitor, we cannot say that it committed legal error when, in its attitude as of the times pertinent in this case, it took the view that "minimal service is to be preferred to no service

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[43] The Commission's decision states that there are 15 commercial television stations assigned to the Los Angeles Market. Joint Appendix at 16. However, only 12 commercial stations are currently operating. 44 Television Factbook, at 70-b.

at all." *Compare Broadcast License Renewal Act*, H. REP. No. 93-961, 93d Cong., 2d Sess. 17 (1974). There is no need here to expand on "renewal expectancies." We are not faced with a situation where a superior applicant is denied a license because to give it to him would work a "forfeiture" of his opponent's investment. We merely confirm what we intimated in the *Greater Boston Television Corporation* case—that, when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license. 444 F.2d at 854, 859.

It is worth emphasizing the special posture of this particular case. It is based on a record built under standards which have since been upgraded or modified or reconsidered by the Commission. New community ascertainment criteria have been issued and there is now a requirement for something of a continuing dialog between a station and its audience. The agency has also undertaken its rule-making process on cross-ownership. The development, through rule-making, of standards of "substantial performance" also seems imminent and should prove helpful. We hold here only that under the former criteria the Commission, when faced with a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent, did not commit reversible error by awarding the license to the incumbent.[44]

Affirmed[45]

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[44] Judges Leventhal and Davis join in the court's affirmance of the Commission for the reasons given, but wish to note, speaking for themselves, that the Commission could have considered the alternatives of granting RKO a short or conditional license rather than limiting itself to a choice of nonrenewal or a full three-year license. The FCC's authority to grant short licenses was made explicit by the 1960 Communications Act Amendments, now codified at 47 U.S.C. § 307(d) (1970), and the agency has in fact granted short licenses

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particularly where ex parte communications or other conduct have raised questions about a potential licensee's character or where the successful licensee has succeeded only by default. *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 845 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *South Florida Television Corp. v. F.C.C.*, 349 F.2d 971, 972 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 987 (1966). The Commission also has the authority to grant conditional licenses, 47 U.S.C. § 303(r) (1970), and has in the past even granted a one-year conditional license, *see Office of Communication of the United States Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). While in that case this court disapproved the grant of any license to WLBT the court did state that, where the licensee showed signs of being willing to live up to the conditions, such a limitation on the license was completely proper. *Id.* at 1008 n.28.

Particularly where a qualified competitor brings a licensee's weaknesses to the FCC's attention, the public interest might be better served by the Commission's considering whether a short or conditional license would induce the licensee to correct the weaknesses—here going both to programming and to character. *See* Golden, *supra* note 26 at 1026-27. In addition, such a license could serve, if needed, as a basis for treating the licensee as a new applicant when the license comes up for renewal. *See Greater Boston Television Corp. v. F.C.C.*, *supra* at 854, 856.

Since this point, though suggested from the bench at oral argument, was not raised before the Commission, nor presented to this court in the appeal papers, it is not fairly before us for decision at this time. We note the point, however, to avoid the possibility that our affirmance will be taken as precluding such a more limited disposition when the FCC comes to consider the impact of the WNAC proceeding.

[45] Our affirmance, as already observed (*see* notes 9, 12, 17, and 25, the text appurtenant thereto, and the text at the end of Part III, *supra*), is conditional (as was the Commission's decision) on the ultimate outcome of the WNAC proceedings. *See Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443, 451-52 (D.C. Cir. 1974).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIDELITY TELEVISION, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

RKO General, Inc., Intervenor

No. 73-2213

United States Court of Appeals,
District of Columbia Circuit.

June 30, 1975.

ON PETITIONS FOR REHEARING, RECONSIDERATION OR CLARIFICATION AND SUGGESTIONS FOR REHEARING EN BANC

Before LEVENTHAL and ROBB, Circuit Judges, and DAVIS*, Judge, United States Court of Claims.

PER CURIAM:

Fidelity Television, Inc. has filed a petition for rehearing of our March 6, 1975 decision in this case. Also, the Citizens Communication Center (CCC), a non-profit organization supporting diversity in broadcasting, has asked for leave to file as amicus curiae a petition in support of re-

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

hearing or clarification of our decision, and has submitted such a petition. We regret that CCC did not ask to participate in this case at an earlier time. As intervenor RKO has noted in its opposition to CCC's petition, the Center's concern is really with what the Commission, rather than the court said and did, and the arguments it now makes could have been cogently made earlier. We have, however, decided to allow the Center's petition to be filed, to give us the opportunity to reemphasize the limited scope of the previous opinion. Having done so, we deny the petitions for rehearing and reconsideration.

Our opinion affirmed the Federal Communication Commission's decision to renew the license of intervenor RKO General, Inc. for station KHJ-TV in Los Angeles rather than awarding the license to challenger Fidelity Television, Inc. The decision in no way approves a return to the partial comparative hearing procedure of the 1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), which procedure we vacated in Citizens Communications Center v. F. C. C., 145 U.S.App.D.C. 32, 447 F.2d 1201 (1971). The Commission here held, as it must, a full comparative hearing under the 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). The "spur to competition" of that procedure was preserved here, and in fact reaffirmed when the Commission required KHJ, upon a finding that its service had not been superior, to run the gamut of comparison with Fidelity on the traditional comparative factors of integration and diversification.

What we decided (slip pages 31-33, ___U.S.App.D.C. pages ___ - ___, ___ F.2d pages ___ - ___) is that the Commission could permissibly determine after such a full comparative hearing that (a) "Fidelity and RKO were essentially equally poor contenders—or at the best, both were

minimally acceptable applicants", (b) though in this situation the agency might well have rejected both the existing licensee and the challenger, that position was not put before the Commission and in those circumstances we cannot overturn its decision to follow the theory that "minimal service is to be preferred to no service at all"; (c) since a choice was to be made, between two competitors on an equal plane, it could properly light on the existing licensee; and (d) the issue of whether the license could or should have been renewed conditionally or for a period shorter-than-normal was not before us, not having been raised below or here.

As we pointed out in the opinion (slip pages 31-32, ___ U.S. App. D.C. pages ___, ___, ___ F.2d pages ___, ___), Fidelity did not show itself a superior or preferable applicant but rather "a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent." On this general subject the hearing examiner said: "Once it clears the easy (for it) hurdles–local ownership, radio diversification and public opinion–Fidelity does not look too good. Attached to its qualifications are no experience in the field of broadcasting, no contributions to the art, no proof through the school of experience of licensee answerability for stewardship, no proof, through the same school, of ability to stand the shock of adverse financial conditions, and no demonstrated ability to conceive and present programs of high quality [footnote omitted]." In the same connection, the examiner severely criticized the applicant's integration proposals, which placed inexperienced stockholders, working part-time, in supervisory roles. He said: "If Fidelity is serious about its proposal, it is projecting an operation that will, at best, be signalized by confusion, and, at worst by chaos. * * * Proposals such as this are susceptible of two interpreta-

tions that should not be shrugged off. Either the proponents honestly believe that operation of a television station, unlike any other enterprise, can be effectively directed by an inexperienced group on a part-time basis, or they advance the proposal for show purposes only without intention to effectuate it. Neither inference is very palatable. The former suggests witlessness. The latter raises questions as to the advisability of entrusting stewardship to those who would attempt to fob off on a licensing agency such a tall tale." That is the type of challenger this case concerns.

Moreover, we stated several times in the opinion that our review of the Commission looked to the manner in which, in *1973*, not 1975 or any date in the future, the agency applied its then existing policy and rules to the case at hand. At that time, the Commission, by rule and by decision, consistently distinguished, in making assessments under the diversification criterion, between situations in which a multiple licensee wished to obtain a new station and those in which the organization was applying for renewal of a pre-existing license. On the other hand, the Commission's decision in this case was rendered prior to promulgation of the 1975 newspaper cross-ownership rules. Second Report and Order, Docket No. 18110, F.C.C. 75-104 ¶131 (Jan. 31, 1975). These rules adopt a structural rather than a functional approach to diversification even as to existing licenses under which an entity which owns a newspaper may not, in some structurally specified cases, retain a broadcast license. We made and make no decision whether, under such an approach, it would be possible to allow any entity to retain multiple licenses. We decided only that, *as of 1973*, the FCC applied its contemporaneous diversification policy which, as to renewal applicants, encompassed consideration of functional separation of activi-

ties, in a manner which was essentially consistent with prior law.

When the smoke clears away, we are left with the distinct impression that we have a "nothing" applicant, who has offered an artificial construction of a Southland service philosophy; who has an integration philosophy that the examiner correctly derided as being either "witless" or insincere; who has shown lack of candor in certain aspects[1] –and who comes before the FCC rather naked, saying that even so I am better naked than the incumbent, because he lacks diversification.

And what we answer is that, on the criteria at the time, the FCC was not in violation of law in applying a diversification criterion that held that RKO's operation of stations autonomously and independently met the objectives sufficiently to withstand the competition of a "nothing" competitor.[2]

The petitions for rehearing and reconsideration are denied.

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[1] In para. 33, the Commission stated that there was a "repeated failure to make timely and necessary reports of new developments affecting a proposal." It noted that "this practice continued even after its attention was directed to the need to keep its house in order." It concluded "we believe that the record here gives little promise that Fidelity will effectively implement its paper integration promises . . . ." (JA 19-20)

[2] Even as of 1973, this was not a ruli..g that exluded all newcomers. Even a newcomer to TV can make a presentation built on the experience of at least one or two key stockholders identified with management, on a reasonably bona fide and practicable approach, the kind presented by at least one applicant in the much-discussed *WHDH* case, see Greater Boston TV Corp. v. FCC, *infra*, 143 U.S. App.D.C. at 405, 444 F.2d at 863.

Statement of BAZELON, Chief Judge, as to why he voted to grant rehearing en banc:

In an earlier day, this court tended to affirm comparative licensing decisions with only the most limited inquiry into the process of decision-making. If the FCC denominated the factors operative in its decisions with some reasonable clarity, this court would not intervene even if the decision under review was illogical in terms of Commission policy, conflicted with past decisions of the agency or otherwise was not fairly reasoned out from established standards. In revent years this court has, it appeared to me, moved away from this posture into a more demanding stance, requiring of the Commission that it adhere to the rule of law in its comparative and other discretionary decisions.[1] The decision here adopts the form of this more recent approach–assuming a basically in depth inquiry into the Commission's process of decision–but, I think, not the substance. In our earlier approach, we took the view that the comparative decision was essentially political and not bound by the rule of law; the least that could be said for this approach was that it did not attempt to justify in rational terms the helter-skelter so often present in comparative decisions. The court's opinion in this case unfortunately may be seen as a rational justification for an essentially un-rational decision. Moreover, the central issue of the applicability of the rule of law to highly

[1] *See* Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); WAIT Radio, Inc. v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969), on subsequent appeal, 148 U.S.App.D.C. 179, 459 F.2d 1203 (1972); Star Television, Inc. v. FCC, 135 U.S.App.D.C. 71, 416 F.2d 1086, 1089, cert. denied, 396 U.S. 888, 90 S.Ct. 171, 24 L.Ed.2d 163 (1969) (Leventhal, J., dissenting). *Compare* note 87 *infra*.

discretionary decisions is not sufficiently delineated and our choices in regard to this issue are therefore less informed to that extent.

The purpose of this statement is to discuss these matters in the course of demonstrating the manner in which the Commission has failed to follow the rule of law in this case. This project involves a consideration of the administrative policies and judicial decisions which the Commission either ignored or misapplied in its decision. The organization of the statement is as follows. First I indicate the manner in which the Commission has granted an illegal renewal expectancy to RKO General, Inc., one of the comparative participants, in contravention of our decision in Citizens Communication Center v. FCC, 145 U.S.App.D.C. 32, 447 F.2d 1201 (1971). This entails (A) a consideration of the manner in which the past performance of a renewal applicant may be considered under the *CCC* decision and an argument that this consideration entitles RKO to no renewal expectancy (slip-pages 3-8, ___ U.S.App.D.C. pages ___ - ___, ___ F.2d pages ___- ___); (B) a discussion of the subliminal process the Commission used to avoid a comparative decision and to grant an illegal renewal expectancy (slip-pages 8-12, ___ U.S.App.D.C. pages ___ - ___, ___ F.2d pages ___- ___); (C) an argument that the Commission failed to follow its own precedent in its ruling on the diversification of ownership comparative factor (slip-pages 12-17, ___ U.S.App.D.C. pages ___-___, ___ F.2d pages ___-___); and (D) a review of a passel of related errors which taken together strongly indicate that the Commission nullified the comparative hearing process (slip-pages 17-21, ___U.S.App.D.C.___-___, ___F.2d pages___-___). Second, I suggest that the Commission improperly denied a hearing on a specialized programming issue raised by Fidelity Television, Inc., the other comparative participant,

on extremely technical grounds and in contravention of our recent decision in Citizens Committee to Save WEFM v. FCC, 165 U.S.App.D.C. ___, 506 F.2d 252 (1974) (en banc). This involves (A) a consideration of the grounds upon which the programming issue was denied and a rejection thereof (slip-pages 21-27, ___ U.S.App.D.C. pages ___-___, ___ F.2d pages ___-___); and (B) a review of First Amendment issues implicated by consideration of past and proposed programming in comparative hearings (slip-pages 27-29, ___ U.S.App.D.C. pages ___, ___, ___ F.2d pages ___, ___).

I. *RKO General Was Granted an Illegal Renewal Preference*

A. *CCC and the Permissible Extent of Renewal Expectancies*

As the court explains, RKO General, Inc., a wholly owned subsidiary of the General Tire and Rubber Company, was until 1965 the licensee of KHJ-TV, Channel 9 in Los Angeles. On August 31, 1965, RKO filed an application for renewal of its license for KHJ-TV. On October 25, 1965, Fidelity Television, Inc., filed a mutually exclusive application for a construction permit to operate Channel 9. The two applications were set down for a comparative hearing. There then ensued four years of litigation over Fidelity's attempts to enlarge the issues to be heard in the comparative hearing. The result of this litigation is described and criticized in Part II. On August 13, 1969, the Hearing Examiner recommended that Fidelity's application be granted and that RKO's application be denied. Two further years of delay ensued as the Commission pondered whether to reopen the record at the comparative hearing and take further evidence of anti-competitive violations by

General Tire. Having decided against this course of action,[2] the Commission then delayed decision for two further years. After prodding from this court, the Commission finally issued its decision almost another year after that.[3] This decision declined to accept the Hearing Examiner's recommendation and instead granted RKO's renewal application and denied Fidelity's application.[4] The vote in the Commission was 3–2, with the deciding vote being cast by Chairman Burch who concurred in the result of the majority only and not the opinion issued.

Accepting for the moment the scope of the hearing held and the propriety of the Commission's treatment of the standard comparative issues, the *ratio decidendi* of the Commission was this:[5]

> From our consideration of these [applications] up to this point, we have established that each applicant is basically qualified to be a licensee, that the characteristics of the [applications] differ in certain respects, but that *none of those differences provides a basis for making a choice* between the two applicants in this proceeding. Nonetheless a selection must be made, and so we shall look to other aspects of the record affecting the public interest. In this connection, we believe that recognition must be given to the rights and expectancies of an ordinary renewal applicant. . . . .

[3] The history of the extraordinary delay in this case is discussed in Fidelity Television, Inc. v. FCC, 163 U.S.App.D.C. 441, 502 F.2d 443 (1974).

[4] RKO General, Inc., 44 F.C.C.2d 123 (1973).

[5] *Id.* at 136-37 (emphasis added).

> [In light of RKO's substantial investment in the station to make the Channel viable and in light of the renewal expectancies of RKO], we believe that there is a public interest, both in the Los Angeles area and the nation at large, in insuring the predictability and stability of broadcast service. If there is no such security for applicants seeking facilities with the intention of providing good service to the public, the overall development and motivation of the industry will suffer. . . . [We] are persuaded that credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of existing service. . . . [Since] the record is clear that Fidelity has not demonstrated that it will in fact provide a better service than RKO, we are convinced, for the reasons set forth above, that RKO's renewal application . . . must be preferred.

Initially, it appears that the court misapprehends this rationale for decision. The reader may wish to compare the foregoing quotation with the following representation of it in the court's opinion:[6]

> On the whole it is fair to say that the Commission found that the ultimate effect of its analysis of the record was that Fidelity and RKO were essentially poor contenders–or, at the best, both were minimally acceptable applicants. . . . [We] cannot say that [the Commission] committed legal error when, in its attitude as of the times pertinent in this case, it took the view that 'minimal service is to be preferred to no service at all.' *Compare* Broadcast License Renewal Act, H.Rep.No. 93–961, 93d Cong., 2d Sess. 17 (1974). There is no need here to expand on 'renewal expec-

[6] Slip pages 31-32, —— U.S.App.D.C. pages ——, ——, —— F.2d pages ——, —— (emphasis added).

> tancies.' We are not faced with a situation where a superior applicant is denied a license because to give it to him would work a 'forfeiture' of his opponent's investment. We merely confirm what we intimated in [Greater Boston Television Corp. v. FCC, 143 U.S. App.D.C. 383, 444 F.2d 841, 854, 859 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971)] – that, when faced with a fairly and evenly balanced record, the Commission may, *on the basis of the renewal applicant's past performance*, award him the license.

The court does not inform us from whence comes the quote "minimal service is to be preferred to no service at all." It surely does not come from the Commission's opinion. The Commission referred to the value of "continunation of existing service" and not to the value of minimal service over no service at all. And indeed it had no other choice since we confront here not a petition to deny–where the value of minimal service over no service at all is certainly relevant – but rather a *comparative hearing*–where the issue is not the existence of service but rather who shall provide it. Why the court finds no need to "expand upon renewal expectancies" is not at all clear to me, since I read the Commission as basing its decision squarely on renewal expectancies.

The court suggests that the Commission's decision was based on a rule that among equal applicants, the renewal applicant may be preferred on the basis of "past performance." First, the court's point about the non-superiority of Fidelity's application is entirely circular since that issue can only be determined by making a comparative evaluation. But the Commission's decision, as the quoted excerpt shows, did not make a comparative decision since it chose largely on the basis of "renewal expectancies." In

other words, Fidelity's application was not "superior" simply because the Commission never decided whether it was! As is discussed in more detail in slip pages 9–10, ___ U.S.App.D.C. pages ___, ___, ___ F.2d pages ___, ___, *infra*, use of the renewal expectancies, clearly relied upon by the Commission, completely short-circuits the comparative evaluation process. Hence, the Commission did not choose between "equal" applicants since the very notion of a comparative choice requires that one applicant be "more equal" than others. The question is why is that applicant better. To that question, the Commission's only answer is "renewal expectancies."

Second, the Commission did not, repeat did not, award renewal to RKO on the basis of RKO's past performance. The previously quoted excerpt should make that point clear. If further proof is needed, the following additional quote should provide it:[7]

> [We] are persuaded that there are sufficient good points to offset the less favorable aspects of KHJ–TV's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, *thus warranting neither a preference nor a demerit.*

Earlier in its opinion, the court expressly affirms this holding.[8] Indeed, both the Commission and the court had to

[7] RKO General, Inc., 44 F.C.C.2d 123, 133 (1973). Presumably, if the Commission had in fact made a comparative decision, RKO's past record would be entitled to some weight in comparison with Fidelity's advantages.

[8] Slip pages 26-28, —— U.S.App.D.C. pages ——, ——, —— F.2d pages ——, ——. At slip page 28, —— U.S.App.D.C. at page ——,

labor valiantly, for what purpose I do not know, to overturn the Examiner's finding that RKO deserves demerit for its past performance.[9] The Commission's decision is based purely on renewal expectancies, on the value of "continuation of existing service."

The issue thus delineated is whether the Commission may use the value of "continuation of existing service", quite apart of the quality of that existing service, as a factor in comparative renewal hearings. Initial reference to the relevant statutory provisions would indicate that this factor is legally irrelevant.[10] However, early Commission practice was to grant a basically insuperable advantage to the incumbent on the basis of past performance.[11] Thus,

— F.2d at —, the court makes the rather opaque statement that RKO's past performance as a licensee in the areas of integration, diversification and local ownership as well as past programming performance are to be considered as part of the renewal applicant's past performance. This statement is confusing. Of course, the renewal applicant's proposal, as well as a new applicant's proposal will be scrutinized and compared on the above-mentioned factors. But such factors have no significance in regard to a renewal expectancy engendered by past performance. And, of course, RKO's "past performance" on those factors is dreary indeed.

[9] *See* RKO General, Inc., 44 F.C.C.2d 123, 130-33 (1973); Slip pages 26-28, — U.S.App.D.C. pages —, —, — F.2d pages —.

[10] *See* 47 U.S.C. §§ 301; 304; 307(d); 309(h)(1) (1970), *quoted and discussed* Citizens Communications Center v. FCC, 145 U.S.App.D.C. 32, 447 F.2d 1201, 1209 n. 23 (1971).

[11] Hyde, FCC Policy and Procedures Relating to Hearings On Broadcast Applications in Which a New Applicant Seeks to Displace A Licensee Seeking Renewal, 1975 Duke L.J. 253, 256-61. *See also* Citizens Communications Center v. FCC, 145 U.S.App.D.C. 32, 447 F.2d 1201, 1207-08 (1971); Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 854-858 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); WOKO, Inc. v. FCC, 80 U.S.App.D.C. 333, 153 F.2d 623, 629-30, rev'd on other

administrative practice, confirmed by the courts, was that some consideration must be given to incumbency or renewal expectancies. The question became not whether renewal expectancies were to be recognized but what was the proper consideration of renewal expectancies.

This court provided the framework for analysis of that issue in Citizens Communications Center v. FCC, 145 U.S. App.D.C. 32, 447 F.2d 1201 (1971). There we considered a Commission policy of refusing to assess the comparative qualifications of competing applicants in renewal hearings until after the Commission had determined whether the incumbent licensee had performed "substantial service." If the licensee had performed such service, then renewal was granted without consideration of comparative factors. If the licensee did not so perform, a full comparative hearing was held.[12] We rejected this policy as inconsistent with the statutory and caselaw requirement for a full comparative hearing on the qualification sof competing applications. This holding was not purely formal: the right to a full comparative hearing involved not only the right to

grounds, 329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204 (1946). *Compare* these statements *with* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 60 S.Ct. 693, 84 L.Ed. 869 (1940); Crowder v. FCC, 130 U.S.App.D.C. 198, 399 F.2d 569, 571, cert. denied, 393 U.S. 962, 89 S.Ct. 400, 21 L.Ed.2d 375 (1968); Transcontinental Television Corp. v. FCC, 113 U.S.App.D.C. 384, 308 F.2d 339, 341-42 (1962); American Broadcasting Co. v. FCC, 89 U.S.App.D.C. 298, 191 F.2d 492, 496-97 (1951), *quoting* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 331-32, 66 S.Ct. 148, 90 L.Ed. 108 (1945); FCC v FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38, 60 S.Ct. 437 437, 84 L.Ed. 656 (1940); L. B. Wilson, Inc. v. FCC, 83 U.S.App. D.C. 176, 170 F.2d 793, 798 & n.5 (1949).

[12] Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, recon. denied, 24 F.C.C.2d 383 (1970).

present a competing applications but also *the duty of the Commission to make a decision on the basis of a comparative examination of the competing applications.*[13] The *CCC* case thus establishes that the Commission may not use renewal expectancies of incumbent licensees to short-circuit the comparative hearing process.

In particularly famous dicta, the *CCC* court defined the proper consideration of renewal expectancies:[14]

> We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. . . . At the same time, *superior* performance should be a plus of major significance in renewal proceedings. The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.

The statement reflected administrative practice (or, at least, stated administrative practice) and was quickly adopted by the Commission after the *CCC* decision.[15] This form of "renewal expectancy" fitted easily into the doctrinal frame-

[13] Citizens Communications Center v. FCC, 145 U.S.App.D.C. 32, 447 F.2d 1201, 1212 (1971), *citing* Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 175 F.2d 351, 356-57 (1949).

[14] 447 F.2d at 1213 & n.35.

[15] *See* Formulation of Policies Relating to the Broadcast Renewal Applicant, 31 F.C.C.2d 443, 444 & n.1 (1971), mandamus denied, Citizens Communications Center v. FCC, 149 U.S.App.D.C. 419, 463 F.2d 822 (1972) *referencing* Formulation of Policies Relating to the Broadcast Renewal Applicant, 27 F.C.C.2d 580, 582 (1971) *and* Policy Statement Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425 & n.1 (1970). *See also* A. H. Belo Broadcasting Corp., 40

work established in *CCC*. A licensee's past performance was clearly indicative of potential as a licensee and thus must be given comparative weight against a challenger's advantages in proposed programming, ascertainment efforts, diversification or whatever. The proper weight to be given to past performance is, of course, a matter for the Commission's judgment.

It is obvious, and the Commission does not seriously deny it, that RKO is entitled to no renewal expectancy under the reasoning of *CCC* ostensibly adopted by the Commission. RKO barely avoided a finding of insubstantial service and received only a lukewarm finding of "average" performance which deserved neither merit nor demerit.[16] RKO would not be entitled to a finding of "substantial" service under the Commission's post-*CCC* suggested guidelines.[17] And, as established above, the Commis-

F.C.C.2d 1131 (1973), on further proceedings, 47 F.C.C.2d 540 (1974); Moline Television Corp., 31 F.C.C.2d 263 (1971).

This kind of renewal expectancy is supported by the various statements of this court on the issue. *See, e. g.*, Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 854, 859 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Office of Communications of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 359 F.2d 994, 1007 (1966).

[16] *See* slip-page 6 & nn. 7-9, ___ U.S.App.D.C. page ___, ___ F.2d page ___ & nn. 7-9, *supra*.

[17] *Compare* Formulation of Policies Relating to the Broadcast Renewal Applicant, 27 F.C.C.2d 580, 582 (1971) *with* RKO General, Inc., 44 F.C.C.2d 149, 161, 173-77 (1969) (Hearing Exam.) (discusses in detail RKO's programming in the various categories of programming identified in Network Programming Inquiry, 25 Fed.Reg. 7291 (1960)). The court, slip page 26 n.36, ___ U.S.App.D.C. page ___, ___ F. 2d page ___ n. 36, makes the assertion that the hearing Examiner "expressed the belief" that RKO would have met standards of "sub-

sion did not find that RKO was entitled to renewal on the basis of past performance. Indeed, the renewal expectancy granted to RKO had nothing to do with RKO's own performance as a licensee, but rather was premised upon a general policy of ensuring the "continuation of existing service" unless a challenger proved that it would "in fact" provide better service than the existing licensee.

We thus have seen that the renewal expectancy awarded to RKO is quite distinct from that approved in *CCC* and accepted by the Commission. It remains to be seen whether that renewal expectancy is inconsistent with the holding and reasoning of *CCC* and the Federal Communications Act.

B. *The Renewal Expectancy Granted to RKO Shortcircuits the Comparative Hearing Procedure.*

The first thing one notices about the renewal expectancy granted to RKO and considered in this comparative hearing is that it has nothing whatsoever to do with RKO's comparative merit as a licensee. Rather it is a general policy, existing wholly apart from RKO, which mandates that renewal will be granted unless a challenger proves that it will "in fact" provide better service that the existing licensee. Initially, we may strike the "unless" clause off the last sentence. The comparative factors in general are designed to determine which competing applicant will pro-

stantial service" if they had existed. However, reference to the Examiners opinion, 44 F.C.C.2d at 228, reveals that this was no more than an expression of confidence that RKO would have upgraded its station to meet the established standards, if such standards had existed, and is not any suggestion, much less a holding, that RKO engaged in substantial service within the intendment of the 1971 proposed guidelines.

vide the "best practicable service."[18] And indeed, the Commission has affirmed that the factor of diversification of ownership of communications facilaities is a factor above and beyond the "best practicable service" determination.[19] Thus, the comparative hearing process is designed to determine whether the challenger will, under the only predictors the Commission recognizes, "in fact" provide better service. The issue is whether the grant of a renewal expectancy such as was given to RKO itself *prevents that determination.* I think it does.

The whole of the Commission's effort in its opinion prior to the passage quoted in Part A above is to establish that neither applicant has a significant advantage over the other. Making the heroic assumption that the Commission succeeded in this effort, it still must, under *CCC*, make a comparative choice; it must make a selection. The mandate of the Act is that the Commission must choose and it has on previous occasions managed to choose on the basis of fairly equal records.[20] But it is precisely at

[18] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394, 395-98 (1965).

[19] *See* Terre Haute Broadcasting Corp., 25 F.C.C.2d 348, 353-55 (1970).

[20] *See, e. g.*, Star Television, Inc. v. FCC, 135 U.S.App.D.C. 71, 416 F.2d 1086, cert. denied, 396 U.S. 888, 90 S.Ct. 171, 24 L.Ed. 2d 163 (1969) aff'g Flower City Television Corp., 9 F.C.C.2d 249, recon. denied, 10 F.C.C.2d 718 (1967); Community Broadcasting Corp. v. FCC, 124 U.S.App.D.C. 230, 363 F.2d 717 (1966); Tennessee Television, Inc. v. FCC, 104 U.S.App.D.C. 316, 262 F.2d 28 (1958); Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956); W. S. Butterfield Theatres, Inc. v. FCC, 99 U.S.App.D.C. 71, 237 F.2d 552 (1956).

this point that the Commission pulls up short and refuses to make a comparative choice, holding that when in doubt it must renew. As I have stated, the renewal expectancy granted to RKO has nothing to do with its comparative qualifications and thus use of that factor may not be justified as simply one more element in the comparative balance. So, the use of the renewal expectancy prevents the challenger from making its case that it will in fact be a better licensee by forestalling the comparative decision which will establish the challenger's contention. This Catch-22 reasoning completely shortcircuits the comparative decision process since it avoid the "overall relative determination upon an evaluation of all factors"[21] which is the *sine qua non* of comparative licensing.

It is no answer to this analysis to assert that the Commission simply imposed a "burden of proof" on the challenger to prove that it is better qualified under the comparative criteria. First, the Commission has not heretofore ever informed challengers that they have a special burden of proof which exists wholly apart from the comparative criteria and, as far as one can tell from the language of the reports, has never expressly applied such a "burden of proof." The Commission advances no reasons in its opinion for departing from its prior practice and none are apparent. Thus, the matter should at least be remanded for that purpose.[22] Second, it is clear that the Commission did not truly use the renewal expectancy as a "burden of proof." Nowhere does the Commission make a comparative judgment between the two applicants, even with a burden of proof on Fidelity. Its whole discussion goes only to prove that RKO is qualified to be a licensee

[21] Johnston Broadcasting Co. v. FCC, 85 U.S. App.D.C. 40, 175 F.2d 351, 357 (1949).

and is entitled to a renewal expectancy. Indeed, the Commission expressly refuses to make a comparative judgment, saying by fiat that none of the differences in the applications provide the basis for making a choice.[23] The Commission nowhere provides any reasoned comparison of these differences; it treats the advantages and disadvantages of the two applicants but makes no comparison. To be sure, the Commission asserts that none of the parties are entitled to a preference or a demerit, as if those two concepts were all or nothing issues. But it never holds that in comparison to each other, Fidelity or RKO should have some advantage or disadvantage because of, respectively, diversification or past performance. And, as will be developed in Parts C and D below, there are very significant differences between the applicants which even under the Commission's reasoning could provide the basis for a comparative choice.[24]

[22] *See* Garrett v. FCC, 167 U.S.App.D.C. ___, 513 F.2d 1056 (1975); Columbia Broadcasting System, Inc. v. FCC, 147 U.S.App. D.C. 175, 454 F.2d 1018, 1026 (1971); *see also* Local 814, Teamsters v. NLRB, 167 U.S.App.D.C. ___, 512 F.2d 564, 571-72 & n.15 (1975) (Bazelon, C. J. concurring in part, dissenting in part) and authorities cited.

[23] RKO General, Inc., 44 F.C.C.2d 123, 137 (1973).

[24] This point might, at first glance, appear too attenuated. If the reader has this reaction, I would suggest a comparison between the cases cited in note 20 *supra* and the discussion in Parts C and D *infra* in regard to their treatment of relative "preferences" and "demerits." Reference may also be made to Mid-Florida Television Corp., 33 F.C.C.2d 1, 9-10, 21, review denied, 37 F.C.C.2d 559 (1972), rev'd on other grounds, TV 9, Inc. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

But more important than these two points, I would hold that the renewal expectancy granted to RKO violates the express provisions of the Federal Communications Act relating to renewal expectancies. 47 U.S.C. § 301 (1970) states that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Other statutory provisions, buttressed by case law, provide reinforcement for this command.[25] The very concept of a three year license demands that the holder be subject to competition at the license's term. To grant an advantage in the comparative hearing process to the incumbent licensee for reasons wholly unrelated to its performance, past and future, nullifies the competition that the three year licensing scheme was designed to preserve. A renewal expectancy based on past performance could in fact encourage competition by providing a safe haven for the diligent licensee. A renewal expectancy not based on past performance will have an opposite result since any competitive spur provided by the three year license will be substantially eliminated. And, of course, there is no precedent in the Commission or in the courts for a renewal expectancy not based on past performance. I need hardly point out that *CCC* specifically and expressly relied on this competitive spur argument to strike down the Commission's previous renewal policy.[26]

There are substantial antitrust and First Amendment considerations which support my position. As *CCC* expressly recognizes, perhaps the most significant comparative qualification which is ignored by a policy that entrenches the incumbent licensee is diversification of ownership.[27]

[25] *See* authorities cited notes 10-11 *supra*.

[26] 447 F.2d at 1214.

[27] *Id.* at 1213 n.36.

The diversification guides, the most important single factor in the comparative hearing,[28] constitute the prime legal rule for dealing with the extremely concentrated VHF television market.[29] The guides thus serve both antitrust con-

[28] Terre Haute Broadcasting Co., 25 F.C.C.2d 348, 353-55 (1970); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965). *See* WHDH, Inc., 16 F.C.C.2d 1, 12-13, on recon., 17 F.C.C.2d 856 (1969), aff'd, Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 859-60 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Lorain Community Broadcasting Co., 13 F.C.C.2d 106, 114, recon. denied, 14 F.C.C.2d 604, rehearing denied, 15 F.C.C.2d 388 (1968), review denied, 18 F.C.C.2d 686 (1969), aff'd, Allied Broadcasting, Inc. v. FCC, 140 U.S.App.D.C. 264, 435 F.2d 68, 69 (1970); Ultravision Broadcasting Corp., 11 F.C.C.2d 394, 410-11 (1968), aff'd, WEBR, Inc. v. FCC, 136 U.S.App.D.C. 316, 420 F.2d 158 (1969). *See generally* TV 9, Inc. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929, 938 (1973), cert. denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

[29] *See* Hale v. FCC, 138 U.S.App.D.C. 125, 425 F.2d 556, 562 & n.2 (1970) (Tamm, J. concurring); Bennett, Media Concentration and the FCC: Focusing with a Section Seven Lens, 66 Nw.U.L.Rev. 15 159, 181-86 (1971). *See also* R. Noll, M. Peck & J. McGowan, Economic Aspects of Television Regulation 15-16, 104-06 (1973); House Comm. on Interstate and Foreign Commerce, Report on Network Broadcasting, H.R.Rep. No. 1297, 85th Cong., 2d Sess. 559-75 (1958); Barnett, Cable Television and Media Concentration, Part I, 22 Stan.L. Rev. 221 (1970). Failure to grant significant weight to a diversification advantage in a comparative renewal hearing would tend to entrench this present pattern of concentration of control by eliminating the prospect of potential competition on the edge of the market. Elimination of this "edge effect" has been one factor that has weighed heavily in more recent anti-trust case law. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-41, 94 S. Ct. 2856, 41 L.Ed.2d 978 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-37, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973) and sources cited. If one inspects the Los Angeles viewing and ad-

cerns, in regard to the market for television advertising, and First Amendment concerns by increasing the number of diverse speakers.[30] The diversification guides serve First Amendment concerns in another manner as well. The passle of program regulation policies presently enforced by the FCC would violate the First Amendment in any context other than telecommunications. The justification for providing a different First Amendment regime to the telecommunications field is the alleged "scarcity" of broadcast speakers, a scarcity which if the truth were known is a product of the extremely concentrated VHF television market.[31] Failure to effectively deal with the concentrated VHF television market will only increase the pressure for more program control. We thus erode our

vertising market for VHF and daily newspapers (on this definition of the relevant market, *see* Multiple Ownership of Standard, FM and Broadcast Television Stations, 50 F.C.C.2d 1046, 1056, 1077, 1083 (1975)), one finds seven VHF television stations and two daily newspapers, a total of nine competitors. Elimination of the threat of potential competition from a merket structured in this manner would surely fall within the rule of the cases cited previously on "edge effect", although the elimination of potential competition does not occur in a merger context.

30 *See* Citizens Comm. to Save WEFM v. FCC, 166 U.S.App.D.C. ___, 506 F.2d 252, 270-72 (1974) (Bazelon, C. J., concurring in the result); TV 9, Inc. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929, 937-38 (1973), cert. denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974); Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1048 (1975) and *id.* at 1116, 1119 (Robinson, Comm'r, concurring in part, dissenting in part), *citing* Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

31 *See* Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, for a complete discussion of this point.

First Amendment freedoms in two days by a refusal to enforce the diversification guides.

I conclude from the foregoing discussion that the court's decision in the present case is inconsistent with *CCC* both because it shortcircuits the comparative process and because it eliminates the competitive spur upon which *CCC* relied in significant part in its holding. Moreover, I think the renewal expectancy granted to RKO violates the Federal Communications Act independently of *CCC*. A review of the Commission's treatment of the diversification guides in the present case provides additional evidence that the Commission both shortcircuited the comparative hearing process and violated the Federal Communications Act with its renewal expectancy for RKO.

C. *The FCC Failed to Follow Its Own Precedent In Its Ruling on Fidelity's Diversification Advantage*

The FCC has traditionally granted a significant comparative advantage to an applicant which possesses no other media interests over an applicant which does possess other media interests. In its 1965 Policy State on Comparative Broadcast Hearings, the Commission had this to say about the diversification guides:[32]

> We believe there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. . . . Since independence and individuality of approach are elements of rendering good program service, the primary goals

32 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394-95 (1965).

of good service and diversification of control are also fully compatible.

. . . . .

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area and finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression . . . in the same community. The number of other mass communications outlets *of the same type* in the community proposed to be served will also *affect to some extent* the importance of this factor in the general comparative scale.

The diversification issue is a standard comparative issue and was duly considered by the Hearing Examiner and the Commission.

The following facts were developed. RKO was the licensee of standard, FM *and* broadcast television licenses in New York City (# 1 viewing market in the country); Los Angeles (# 2 viewing market); Boston (# 5 viewing market); Windsor, Ontario (serving # 6 Detroit market) and Memphis (# 45 viewing market). RKO was the licensee of standard and FM stations in Washington-Bethesda (# 9 viewing market) and San Francisco (# 10 viewing market). RKO has controlling interests in a massive number of CATV franchises serving almost 100 cities and towns.

Several towns are within the Grade B contour of Channel 9. RKO has other media interests, including microwave communications facilities, a chain of movie theaters, programming and advertising services and a small interest in a newspaper in Schenectady, New York. Fidelity has no other media interests. A 3% stockholder of Fidelity has a 10% interest in a CATV franchise 50 miles from Los Angeles. That is the extent of Fidelity's media interests.[33]

From these facts, the FCC reached the miraculous conclusion that neither applicant was entitled to a diversification "preference." Before indicating the absurdity of this conclusion, it is necessary to point out that this finding of no "preference" does not mean that if a comparative evaluation were made, Fidelity would have no advantage on diversification. If the FCC had in facts made a comparative determination, a diversification advantage of some kind would clearly be required. The Commission avoids this, by avoiding a comparative decision, as was noted in Part B above. As will be seen, all the Commission's arguments against Fidelity's "preference" or diversification advantage serve only to reduce its significance, not eliminate it entirely. The vestige is eliminated not by arguments directed to diversification policies but by avoidance of a comparative decision.

Taking a deep breath, I note the following arguments for reducing Fidelity's diversification advantage. First, the Com-

[33] The FCC assets that another stockholder of Fidelity of an unstated interest has a 26% interest in a corporation publishing "newspapers" in the Los Angeles suburbs. RKO General, Inc., 44 F.C.C. 2d 123, 133 (1973). The court properly holds that the Commission committed error in considering this "fact" since Fidelity was denied a hearing on its assertion that these "newspapers" were simple advertising "throwaways." Slip page 30, ___ U.S.App.D.C. page ___, ___ F.2d page ___ n. 42.

mission points out that there are 15 television stations, 126 radio stations and numerous newspapers within Channel 9's signal contour. Second, the Commission finds that RKO has never sought to influence the operation of KHJ-TV to promote a uniform expression of views. Third, the Commission will not attempt to restructure the broadcast industry in comparative hearings.[34] These reasons are completely and utterly inconsistent with every reported comparative decision my office has been able to locate. Perhaps it is the unmitigated audacity of the Commission that stuns the court into accepting its sweeping repeal of the diversification guides. Whatever the reason, it is beyond cavil that the Commission's reasoning will simply not bear analysis unless one makes the assumption that it has *sub silentio* repealed the guides.

First, as the 1965 Policy Statement clearly provides and as has been followed in every case decided since it promulgation,[35] the existence of other media *of the same type* in

[34] RKO General, Inc., 44 F.C.C.2d 123, 133-34 (1973).

[35] *See* Terre Haute Broadcasting Corp., 25 F.C.C.2d 348, 349, 350-51 (1970); WHDH, Inc., 16 F.C.C.2d 1, 12-13, recon. denied, 17 F.C.C.2d 856 (1969), aff'd, Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 859-60 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Ultravision Broadcasting Corp., 11 F.C.C.2d 394, 410-11 & n. 29 (1968), aff'd, WEBR, Inc. v. FCC, 136 U.S.App.D.C. 316, 420 F.2d 158 (1969). While ultimately not awarding the license to the applicant with the diversification advantage, the Commission affirmed the proposition that other media outlets only discount the diversification preference and do not at all eliminate it in Mid-Florida Television Corp., 33 F.C.C.2d 1, 9-10, recon. denied, 37 F.C.C.2d 559 (1972), rev'd on this ground in part for failure to give complete consideration to diversification, TV 9, Inc. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929 (1973), cert. denied, 419 U.S. 968, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974), *citing* Flower City Television Corp., 9 F.C.C.2d 249, 254, recon. denied, 10 F.C.C.2d 718 (1967), aff'd, Star Television, Inc. v. FCC, 135 U.S.App.D.C. 71, 416 F.2d 1086, cert. denied, 396 U.S. 888, 90 S.Ct. 171, 24 L.Ed. 2d 163 (1969). *See also* Brandywine-Main Line Radio, Inc. v. F.C.C., 153 U.S.App.D.C. 305, 473 F.2d 16, 28 (1972), cert. denied, 412 U.S. 922, 93 S.Ct. 2731, 37 L.Ed.2d 149 (1973) (only inquiry under Fairness Doctrine is balance within a licensee's own programming and not in the viewing market as a whole).

the community may be weighed *to some extent*. However, the existence of other outlets neither cancels a diversification advantage, nor indeed renders it insubstantial. This principle has been applied in cities such as Boston, Terre Haute, and Buffalo.[36] And no other conclusion would be plausible considering the express provision in the Policy Statement[37] and recent cases[38] that the diversification guides are directed to concentration of control in the nation and several regions, not only within a viewing market. In fact, this policy is implicit in the group owner-

[36] *See* cases cited note 35 *supra*.

[37] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394-95 (1965).

[38] Billy T. Pirtle, 43 F.C.C.2d 670, 671 (1973), *citing* Snake River Valley Television, Inc., 26 F.C.C.2d 380 (1970). *See* Alvin L. Korngold, 45 F.C.C.2d 1, 4-5 (1974); The News-Sun Broadcasting Co., 24 F.C.C.2d 770, 775-76 (1970); East St. Louis Broadcasting Co., 19 F.C.C.2d 289, 292-93 (1969). *See also* McKenney v. FCC, 116 U.S.App.D.C. 412, 324 F.2d 444 (1963); McClatchy Broadcasting Co. v. FCC, 99 U.S.App.D.C. 195, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918, 77 S.Ct. 662, 1 L.Ed.2d 665 (1957) (in these cases the court affirmed Commission actions awarding a comparative demerit against an applicant with media ties outside of the service area.) *See generally* Clarksburg Publishing Co. v. FCC, 96 U.S.App.D.C. 211, 225 F.2d 511, 518 (1955).

ship and chain broadcasting rules.[39] Even if all this were wrong, we would still want to consider how many of those other outlets in Los Angeles are truly independent. We know that at least two are owned by RKO itself and three VHF television licensees are owned by the three major networks as flagship stations, as well as an unknown number of radio stations.

Second, none, repeat none,[40] of the cases considering the diversification guides consider the fact that the owner

[39] *See* Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1049 (1975); Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), on recon., 28 F.C.C.2d 662 (1971); Multiple Ownership of Standard, FM and Television Broadcast Stations, 18 F.C.C. 288 (1953); mod. Storer Broadcasting Co. v. United States, 95 U.S.App.D.C. 97, 220 F.2d 204 (1955), reinstated, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081, affirmed on remand, 99 U.S.App. D.C. 369, 240 F.2d 55 (1956). *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971); Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

Even when one considers intra-viewing market concentration, Fidelity would under established precedent be entitled to a substantial diversification demerit. Fidelity, as stated in the text, owns an AM and an FM station in Los Angeles as well as certain cable franchises within Channel 9's Grade B contour. *See, e.g.*, Industrial Business Corp. 47 F.C.C.2d 891, 892, 897 (1974); Lorain Community Broadcasting Co., 13 F.C.C.2d 106, 114, recon. denied, 14 F.C.C. 2d 604, rehearing denied, 15 F.C.C.2d 388 (1968), review denied, 18 F.C.C.2d 686 (1969), aff'd, Allied Broadcasting, Inc. v. FCC, 140 U.S.App.D.C. 264, 435 F.2d 68, 69 (1970). *See also* Scripps-Howard Radio, Inc. v. FCC, 89 U.S.App.D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830, 72 S.Ct. 55, 96 L.Ed. 628 (1951).

[40] The court makes a rather extraordinary cit to McClatchy Broadcasting Co., 19 F.C.C. 343 280-281 (1954), aff'd McClatchy Broadcasting Co. v. FCC, 99 U.S.App.D.C. 195, 239 F.2d 15 (1956),

has not imposed uniform expression of views in ruling on the application of the guides. To do so would run counter to the oft stated maxim of antitrust law that one does not distinguish between "good" monopolists and "bad"

cert. denied, 353 U.S. 918, 77 S.Ct. 662, 1 L.Ed.2d 665 (1957) in which the Hearing Examiner relied on the so-called "autonomy" argument to reduce a diversification preference (although not to eliminate it). But the Commission refused to accept that reasoning, reversed the Hearing Examiner's recommendation and awarded to the applicant with the diversification advantage. This court affirmed. Of course, the court is correct that the Commission "considered" whether the licensee had met the goals of diversification by autonomous operation, slip page 30, ___ U.S.App.D.C. page ___, ___ F.2d page ___, but fails to inform the reader that the Commission *rejected* the argument. In the cases cited in notes 28, 35, 38-39 *supra*, there is no evidence of Commission consideration of autonomu in ruling on the weight of a diversification preference. The reasoning of those cases implicitly rejects such a contention. As the *amicus* Citizens Communications Center argues, the autonomy rationale would seemingly nullify the multiple or group ownership provision, as well as the duopoly rules, since the licensee could argue that it has met the "goals" of the rules by "autonomous" operation. And, as may be evident, the Commission in its decision did not rely on "autonomous" operation so much as the fact that there was no evidence that the control of ownership was exercised to promote a uniform expression of views.

Turning to the Commission's true rationale, it is clear that *ad hoc* inquiry into whether diversification demerits translate into a failure of diversity would require a prescience of what is "uniform" expression of views, a skill the Commission is not required to achieve and which has shown no success in achieving. *Cf.* Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1119-21 (1975) (Robinson, Comm'r, concurring). The Commission has followed this approach to a very limited and unsuccessful extent in petitions to deny in cross-ownership situations. *E.g.* Columbus Broadcasting Coalition v. FCC, 164 U.S.App.D.C. ___, 505 F.2d 320, 324-325 (1974); Stone v. FCC, 151 U.S.App.D.C. 145, 466 F.2d 316, 331 (1972); Hale v. FCC, 138 U.S.App.D.C. 125, 425 F.2d 556, 560

monopolists in application of antitrust policy.[41] Moreover, the Commission does not inform us how one defines uniform expression of views as opposed to local expression of views. To make the distinction raises very serious First Amendment questions indeed. Third, the Commission's reference to restructuring of the broadcast industry is entirely gratuitous and conclusory since the diversification guides by their nature will cause restructuring if applied. The reference is thus no more than a bad humored attack on the existence of the guides.

The court affirms this bizarre, vertiginous reasoning by simply incanting it out loud and citing in support two of the leading cases upholding a strict application of the diversification guides. The court does not cite and shows no

(1970). The Commission promoted this approach only as a temporary measure while it examined proposed rules and this court expressly affirmed it on that basis. The adoption of the rules on cross-ownership represent a rejection of the *ad hoc* approach and the expression of a general sentiment that the dangers to diversity because of the *power* gained through concentration is sufficient to prohibit the concentration. Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, 1054(1975). These rules represent the limit of cross or common ownership as a *disqualification* factor; they are to be extended in comparative hearings through the diversification guides. *Id.* at 1055, 1087-88 (since cross-ownership rules are prospective, in large part, major consideration of diversification in comparative hearings will occur in renewal proceedings).

[41] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-14, 221-22, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *citing* United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The policies stated in these two cases, that there is no feasible or efficient manner of administration of monopoly power to ensure against abuses, are applicable to the Commission's logic.

awareness of the multitude of Commission cases which are inconsistent with this reasoning, even though we have only recently reaffirmed the proposition that the Commission must follow its own precedent or explain why it has not.[42] One possible distinction of these precedents, not mentioned by the court, is that they all involve non-renewal comparative hearings. However, this distinction goes to the weight of a diversification preference in comparison with the past broadcast record of the renewal applicant and does not at all purport, in any case except this one, to affect the ascertainment of a diversification advantage in the first place. The Commission's treatment of the diversification guides in this case truly illumines its intent in erecting the renewal expectancy mentioned in Parts A and B. Without any supporting reasoning to speak of, the Commission nullifies the diversification guides in comparative renewal hearings and the court, laboring valiantly, sweeps up behind it. And for what purpose we are never told.

. Perhaps what underlies this extraordinary holding is the instinctive feeling that despite its substantial diversification advantage, Fidelity is not really that good an applicant. This feeling is apparently based on sever comments of the Hearing Examiner to the effect that Fidelity's lack of experience renders it suspect as a licensee.[43] But it should be absolutely clear that no new voice will ever have experience; this is inherent in being new. And if it is an important communications policy to increase the number of diverse voices, speakers, in the telecommunications system, a goal frequently avowed, then we are just going to

[42] *See* sources cited note 22 *supra.*

[43] *See* RKO General, Inc., 44 F.C.C.2d 123, 226-27 (1969) (Hear-Exam.). *See* slip pages 31-34, ___U.S.App.D.C. pages ___-___, ___ F.2d pages ___-___, *infra* and sources cited.

risk the mistakes of inexperience against the mistakes of a lack of diverse speakers. In any event, the issue cannot be dispositive on this appeal since the Commission did not expressly make it a ground for decision.[44]

D. *Other Comparative Factors Misapplied By the Commission*

The Commission's mutilation of the diversification guides is, unfortunately, only indicative of its treatment of the other comparative factors. Again, as with the diversification guides, the manner in which the Commission removes Fidelity's advantages or RKO's disadvantages does not fully eliminate the existence of advantages and disadvantages. Rather, as I have said, that is performed by a failure to make a comparative decision.

The Commission takes its hatchet to the "integration of ownership into management" factor and here we get the stench of procedural bias. Fidelity, the Commission admits, has an obvious advantage in this factor. The Commission adduced these reasons for giving Fidelity no "preference" on the factor. First, the Commission notes that the managers of KHJ, while not owners, do have autonomous control of the station. This argument, of course, nullifies the factor and has never been considered bo my knowledge in comparative evaluation of the "integration" factor.[45] Even

[44] *See* SEC v. Chenery Corp., 318 U.S. 80, 92, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *cf.* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962).

[45] *See, e.g.*, Terre Haute Broadcasting Corp., 25 F.C.C.2d 348 (1970); The News-Sun Broadcsting Co., 24 F.C.C.2d 770, 777-78 (1970); WHDH, Inc., 16 F.C.C.2d 1, 13-14, on recon., 17 F.C.C.2d 856

so, this argument says nothing about *Fidelity's* advantage, both through integration and through local ownership and does not even purport to weigh Fidelity's advantage against RKO's.

The Commission's second argument is characterized in Fidelity's brief as a "monstrous abuse of Fidelity's right to due process."[46] This is, if anything, an understatement. The Commission discounts the viability of Fidelity's integration proposal because of the unverified allegations in a Broadcast Bureau and RKO petitions to enlarge issues *which were denied by the Commission.*[47] Accepting these allegations, although Fidelity never had a chance to dispute them, the Commission states that they demonstrate an "unwillingness or inability to carry out its responsibilities as an applicant" and hence call into question Fidelity's integration proposal. The allegations are that Fidelity was remiss in not informing the Commission that its stock subscription agreements were signed by agents of the owners,

(1969), aff'd, Greater Boston Television Corp. v. FCC, 143 U.S.App. D.C. 383, 444 F.2d 841, 862-63 (1970); cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Ultravision Broadcasting Corp., 11 F.C.C.2d 394, 408-09 (1968), aff'd WEBR, Inc. v. FCC, 136 U.S.App.D.C. 316, 420 F.2d 158 (1969); Flower City Television Corp., 9 F.C.C.2d 249, recon. denied, 10 F.C.C.2d 718 (1967) aff'd, Star Television, Inc. v. FCC, 135 U.S.App.D.C. 71, 416 F.2d 1086, cert. denied, 396 U.S. 888, 90 S.Ct. 171, 24 L. Ed.2d 163 (1969). The Commission's argument nullifies the factor because, of course, there will always be integration of management employees into management; this is a truism. The factor seeks to integrate *owners* into management. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965).

[46] Brief for Fidelity Television, Inc., at 123.

[47] RKO General, Inc., 22 F.C.C.2d 737 (1970). *See* RKO General, Inc., 44 F.C.C.2d 123, 135 (1973).

failing to secure prompt ratification of documents so signed and in failing to report for 17 months significant changes in the corporate structure of the company. How does the Commission leap from these allegations to the conclusion that Fidelity will not implement its integration proposal? There is no answer to this question in the Commission's opinion. It hardly requires extended reflection to conclude that the allegations go to character but since no character issue was added to the hearing, consideration on that basis would be inappropriate.[48] There is absolutely no demonstrated relation between the allegations and a possible inability to implement the integration proposal. The Commission was arbitrary in the extreme in suggesting (but never overtly stating) that there was. And, of course, even if the relation existed, it would not eliminate Fidelity's

[48] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 399 (1965).

Fidelity's explanation of these events is recited in the Commission's opinion denying the requested character issue, RKO General Inc., 22 F.C.C.2d 737 (1970). It appears that *one* member of Fidelity's board of directors did not authorize a signature on a stock subscription but did in fact believe himself committed to a $5,000 investment in the company. The individual did in fact function as a member of the board according to the Commission, although it never held a hearing on any of these issues. The other issues relating to changes in Fidelity's corporate structure were reported late but well before the Commission's decision. The facts as to the changes may be gleaned only from the pleadings of the parties, which differ substantially. The Commission never resolved the conflicts in the pleading or even commented on them until its apparent acceptance of RKO's version in RKO General, Inc., 44 F.C.C. 2d 123, 135 (1973). The additional reference in the Commission's opinion to the late reporting of an alleged "newspaper" interest is completely inappropriate and was so recognized by the court. Slip page 30 n. 42, ___ U.S.App.D.C. page ___, ___F.2d page ___ n. 42; note 33 *supra*.

advantage in any comparative evaluation but would only affect its weight.

The court wisely ignores this second half of the Commission's butchering of the integration factor. Instead the court returns to the rationale of the Hearing Examiner who held that Fidelity's integration proposal could not be implemented because the management-owners had no broadcast experience. Apparently, neither the court nor the Hearing Examiner consulted the 1965 Policy Statement which advises us this way on that issue:[49]

> Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management. . . . Since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience generally confers only an initial advantage (Lack of experience, unlike a high concentration of control, is remedial . . .), it will be deemed of minor significance.

This, of course, does not dispose of contentions that an integration proposal can not be implemented but it does call into doubt all the confident assertions by the Hearing Examiner that Fidelity's plan is a "foolish piece of business."[50] And it must be remembered that Fidelity's proposal was only that a Mr. Simon, a 20% stockholder, would be President and General Manager, and that a 2% stockholder would be director of public service programming. The rest of the staff would be professional broad-

[49] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 396 & n. 8 (1965), *citing* Sunbeam Television Corp. v. FCC, 100 U.S.App.D.C. 82, 243 F.2d 26, 29 & n. 6 (1957).

[50] RKO General, Inc., 44 F.C.C.2d 149, 227 (1969) (Hearing Exam.).

casters. In any event, the court has no authority to affirm the Commission on a ground it itself did not offer. The affirmance is clearly wrong on this point.[51]

We next come to the Commission's treatment of the character issue set down against RKO because of its admitted reciprocal dealings, a violation of Section 5 of the Federal Trade Commission Act and Sections 1 or 2 of the Sherman Act.[52] I simply do not have the space, time or energy to describe the procedural minefield the Commission laid for Fidelity on this point and the numerous backings and fillings, shifting of ground, in the years the Commission sought to avoid consideration of this obvious comparative and non-comparative issue. Suffice it to list the admitted facts after the dust had settled. The Commission found that on the basis of an extremely myopic view of the evidence RKO's reciprocal dealing violations were limited to mutual patronage situations. It then concluded that such reciprocal dealings were not at that time clearly illegal under the antitrust laws and thus the Commission would not charge RKO with "knowing and willful misconduct."[53] Furthermore, since many corporations have engaged in such violations, since RKO is presently under an injunction in regard to such practices and since RKO has an "unblemished" record as a broadcaster for 25 years, the Commission will not assess a comparative demerit.[54] The court in affirming takes a slightly differ-

[51] *See* sources cited note 44 *supra*.

[52] 15 U.S.C. §§ 1, 2, 45 (1970); *see* discussion in note 59 *infra*.

[53] RKO General, Inc., 44 F.C.C.2d 123, 130 (1973).

[54] *Id.* The Commission's reference to RKO's "unblemished" record is somewhat baffling since it had just finished concluding that

ent tack. The court independently concludes, without the aid of either the Hearing Examiner or the Commission, that "most" of the reciprocal dealings were ineffective and those that were effective "have little to do with RKO."[55] The court recognizes that reciprocal dealing was declared illegal in 1965 at a minimum and probably much earlier, thus implicitly discounting the Commission's logic.[56] On the basis of this analysis, the remark that "KHJ was only a small part of what went on" and the clearly incorrect assertion that "antitrust considerations are only one segment of the Commission's concern with the character", the court holds the FCC did not act arbitrarily.[57]

The court is clearly mistaken in its assertions about the nature of the reciprocal dealings. Both the Commission and the Hearing Examiner found completed acts of at least mutual patronage involving KHJ that resulted in significant advertising revenues to the station.[58] These acts clearly

RKO had engaged in illegal acts, had only an average past record (at best) and was the member of a sizeable communications conglomerate. What does the Commission think is a "blemished" record?

[55] Slip page 22, ___U.S.App.D.C. page ___, ___ F.2d page ___.

[56] *Id.* slip pages 21, 23, ___ U.S.App.D.C. pages ___, ___, ___F.2d pages ___, ___.

[57] *Id.* slip pages 23-24, ___ U.S.App. D.C. pages ___, ___, ___ F.2d pages ___, ___.

[58] In particular, the record establishes that General Tire, RKO's parent company, engaged in successful mutual patronage reciprocity with Pepsi-Cola, Olin Mathieson, Alcoa, American Airlines and Hertz that resulted in significant (respectively, $36,500, $12,350, $8,069, $9,650 to $14,500, $15,210 to $90,025) increases in KHJ advertis-

violate Section 5 of the Federal Trade Commission Act and at least after 1965, violate the Sherman Act.[59] The

ing revenues. *See* RKO General, Inc., 44 F.C.C.2d 149, 202-204, 210-11, 212-15 (1969), *summarized*, 44 F.C.C.2d 123, 143 (1973) (Lee, Comm'r, dissenting). The Commission itself stated: "Thus, the question here is not whether reciprocal dealing was practiced with respect to KHJ-TV, but whether this conduct should reflect adversely upon the operation of the station." *Id.* at 129.

[59] *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 594-95, 85 S.Ct. 1220, 14 L.Ed.2d 95 (1965); Allis-Chalmers Mfg. Co. v. White Consol. Industries, Inc., 414 F.2d 506, 518-19 (3d Cir. 1969); California Packing Corp., 25 F.T.C. 379 (1937). In *Consolidated Foods*, the Supreme Court found a merger violated Section 7 of the Clayton Act because of the possiblity of reciprocal dealing. If the possibility of reciprocal dealing is sufficient to set aside a merger, it must certainly follow that actual engagement in reciprocal dealing would violate some provisions of the anti-trust laws. Lower courts since *Consolidated Foods* have concluded that Sections 1 and 2 of the Sherman Act are offended by reciprocal dealing. *See* W.L. Gore & Assoc. v. Carlisle Corp., 381 F.Supp. 680, 703 (D.Del. 1974); United States v. General Dynamics Corp., 258 F.Supp. 36, 57-59 (S.D.N.Y. 1966). This seems a fairly uncontroversial extension of the cases outlawing tying arrangements (reciprocity being simply a form of tying). *See* Fortner v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); Northern Pacific R.R. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947). Indeed, the Surpeme Court in *Consolidated Foods*, in declaring reciprocity an unlawful consequence of a merger, specifically relied on the reasoning of the tie-in cases. 380 U.S. at 594, 85 S.Ct. 1220. And even if it does not violate the Sherman Act, reciprocity clearly violates Section 5 of the Federal Trade Commission Act. Since mistake of law is not a defense to civil or criminal charges, *see* United States v. Barker, ___ U.S. App.D.C. ___, 514 F.2d 208 (1975) (Bazelon, C.J., concurring), in most circumstances, it requires some fairly extraordinary leaps of faith to excuse RKO's clear violations of the antitrust laws. And it must be remembered that we are discussing not disqualification, where "knowing" misconduct is particularly relevant (although mistakes of law are not generally part of the "knowing" requirement), but only comparative evaluation.

Commission is expressly commanded to enforce the anti-trust laws against licensees.[60] Even beyond this, use of

The Commission's off-the-cuff assertion in RKO General, Inc., 44 F.C.C.2d 123, 130 n. 21 (1973) that an insufficient amount of commerce was affected to bring to bear the sanction of the anti-trust laws is clearly erroneous for two reasons. First, the commerce requirement is a jurisdictional requirement for federal courts tied to policies of federalism and says nothing about the validity of the trade practices involved. Thus, since the FCC has established jurisdiction over individual licensees, the jurisdictional requirement is not relevant and hence the Commission must look only to the substantive validity of the trade practices involved. Second, the FCC gives no reasoned basis for its conclusion, cites no evidence and in no way correlates the evidence with established guidelines in the area. *See* Greater Boston Television Corp. v. FCC, 143 U.S.App. D.C. 383, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

The one ambiguity in this record relating to RKO's violation of the anti-trust laws concerns the degree of market power necessary to make reciprocity illegal. There is some confusion in the cases, particularly when one refers to the tie-in cases, on whether some kind of market leverage must be shown to make reciprocity illegal. *Cf.* Turner, Conglomerate Mergers and § 7 of the Clayton Act, 78 Harv. L.Rev. 1313, 1386-93 (1965). This issue, while serious from my examination of the facts in this case, was not considered by the Commission. Since the case should be remanded under my view I think the Commission should explore the matter further with the aid of the Justice Department.

[60] *See* National Broadcasting Co. v. United States, 319 U.S. 190, 222-24, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); Philco Corp. v. FCC, 110 U.S.App.D.C. 387, 293 F.2d 864 (1961); Allentown Broadcasting Corp. f. FCC, 94 U.S.App.D.C. 353, 222 F.2d 781, 787, rev'd on other grounds, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955); Mansfield Journal Co. v. FCC, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950).

reciprocal dealing to obtain advertising reduces the incentive to meet the needs of the public since advertising is garnered by economic power and not successful competition.[61] When one considers the fact that RKO was found to have engaged in overcommercialization,[62] the seriousness of the reciprocal dealings in terms of the policies of the Federal Communications Act is manifest. And if one refers back to the strained arguments of the court and Commission on the diversification point, it is clear enough that economic concentration in both media and non-media areas should count very heavily against RKO if not pro-

[61] *See* RKO General, Inc., 44 F.C.C.2d 123, 143-44 (1973) (Lee, Comm'r, dissenting), *citing* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

[62] *See* RKO General, Inc., 44 F.C.C.2d 149, 172-73, 220 (1969) (Hearing Exam.). These statements of fact are not varied by the Commission's decision which only notes that RKO did not violate the NAB Code on advertising time. RKO General, Inc., 44 F.C.C.2d 123, 133 (1973). This statement is not supported by any reasons or evidence, both of which are necessary in light of the fact that RKO does not subscribe to the NAB Code and Fidelity's Exhibits 50-51, summarized in its brief at 88-89, purport to offer proof that RKO consistently violated the NAB Code provisions. RKO and the Commission respond in their briefs by essentially arguing that there are no standards by which to judge whether a licensee has engaged in overcommercialization. They are correct that the Commission has relied on a case-by-case inquiry, Commercial Practices of Broadcast Licensees, 36 F.C.C. 45 (1964), but this does not mean there are no standards at all. RKO seems to challenge the accuracy of Fidelity's information on commercialization in excess of the NAB Code (although the relevance of the Code is not explained); the Commission should forthrightly reconcile the disputes in the evidence and not rely on a mere conclusory statement, particularly in light of the fact that RKO does seem to admit to some commercialization in excess of the Code. *See* Brief for Intervenor RKO General, Inc. at 45.

vide a basis for disqualification. The Commission's failure to even weigh the issue at all in the comparative process is only one more indication that the Commission did not in fact engage in a comparative decision. And what are we to make of the court's statement that KHJ was only a small part of RKO's antitrust violations? This argument seems to support a conclusion opposite from that drawn by the court. The holding on this issue is truly extraordinary.

In terms of procedural unfairness to Fidelity, the preceding instances are unfortunately not exclusive. In its treatment of the programming issues suggested by Fidelity, the Commission continued to avoid a comparative evaluation through controversial procedural decisions.

II. *The Commission Improperly Denied A Hearing on Fidelity's Specialized Programming Issue*

A. *Fidelity's Petition to Enlarge Issues to Consider Programming*

A major factor motivating Fidelity's application for Channel 9 was its belief that communities in Orange County and southern Los Angeles do not receive sufficient attention from television stations in Los Angeles proper. The owners of Fidelity believed Channel 9 could be programmed in such a manner as to meet what they perceived to be the unfulfilled communications needs of the "Southland." Since programming issues will not be considered in a comparative hearing unless they are specifically set down by the Commission,[63] Fidelity filed on June 27, 1966, a petition to enlarge the issues at the comparative hearing. The petition requested in the alternative that the Commission set down a § 307(b) issue in regard to the need of the

[63] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 397-98 (1965).

Southland for an allocated television station or an issue as to Fidelity's "service philosophy", its desire to pay special attention to the needs of the Southland. Fidelity also requested a general programming issue on the basis of its allegations that it would devote substantially more time to news and local affairs than had RKO. This petition was accompanied by an extensive ascertainment survey of 1,200 community leaders and involving over 6,000 telephone calls and meetings with public officials and community organizations.

The Commission rejected the petition. Its finding on the § 307(b) issue is acceptable. I would also affirm its holding denying a general programming issue since Fidelity's petition alleged no facts in regard to the need for greater local or news programming *in general*. The Commission has since 1965 become increasingly strict about the relation of the ascertainment survey to general differences in percentage of news and local affairs programming because of its concern that applicants were engaging in "promise" battles to obtain a license.[64] As I will discuss in Part B below, there are First Amendment considerations which support this approach.

But I perceive no basis at all for the Commission's refusal to accord Fidelity a hearing on its "service philosophy" issue. Fidelity's "service philosophy" is merely a form of specialized programming designed to meet the alleged needs of an underserved portion of a particular service area. The Commission has granted a significant comparative preference on the basis of "service philosophy" in Central Coast Television, 35 F.C.C. 859 (1963), clearly the

64 *Id.* *See* Moline Television Corp., 31 F.C.C.2d 263, 272-73 (1971).

model for Fidelity's petition, and has granted comparative preferences on the basis of specialized programming in other cases.[65] This court in Citizens Committee to Save WEFM v. FCC, 166 U.S. App.D.C. ---, 506 F.2d 252 (1974) (en banc) reversed a Commission order denying a hearing into a speciaiized programming issue in a license assignment context and strongly indicated that the Commission could not ignore its responsibility to ensure a diversity of formats in a service area.[66]

The Commission's Review Board denied Fidelity's proposed "service philosophy" issue for these reasons. First, Fidelity has neither alleged nor shown that the Southland is more underserved than other parts of the service area. Second, Fidelity has not made "factual allegations" that it will not ignore the remainder of the service area. Third, there is no indication that the community leaders surveyed have sought and refused television time. Fourth, Fidelity has not shown a need for the programs directed to the Southland.[67]

The first three reasons are utterly devoid of rational content. What possible relevance is there in the fact that other areas of Los Angeles may be as underserved as the Southland? Such an argument defeats every specialized program-

65 *See* Citizens Comm. to Save WEFM v. FCC, 166 U.S.App.D.C. ___, ___, 506 F.2d 252, 280 & n. 63 (1974) (Bazelon, C. J., concurring in the result) and authorities cited; authorities cited note 72 *infra*.

66 *See* 506 F.2d at 258-62, 265-66 & n. 31 and authorities cited. *See also* Local 880, Retail Store Employees, v. FCC, 141 U.S.App. D.C. 94, 436 F.2d 248 (1970).

67 *See* RKO General, Inc., 5 F.C.C.2d 517, 519-20 (1966), special relief denied, 8 F.C.C.2d 880, clarif. denied, 10 F.C.C.2d 115 (1967).

ming issue. The argument is implicityly rejected by *WEFM*. A similar point may be made about the third reason. Does the Commission seriously expect proponents of specialized programming to prove that their listeners have unsuccessfully sought other broadcasters to carry the specialized programming? And how can the Commission hold Fidelity to the actions of community leaders when those leaders expressly state that there are local needs not being served by present communications outlets?

But the second "reason" deserves more scrutiny. Fidelity expressly states in its petition that if the § 307(b) issue is denied, it will serve the entire service area with particular attention to the needs of the Southland.[68] The Commission says this assertion is not backed by "factual allegations." What factual allegations does the Commission want? Even if some answer to this riddle would appear, and none does, at the very least the Commission should have requested further data (what data would be relevant, I do not know) or provided Fidelity with an opportunity to amend their petition after being informed of what facts the Commission thought were relevant. It must be remembered that Fidelity's petition seeks to merely obtain a hearing and that it offers proposed programming with the express allegation that the proposed programming will serve the entire service area. What more could the Commission want before ordering a hearing?

The court attempts to affirm this second reason by altering the Commission's rationale. Where the Commission's

[68] Petition to Enlarge Issues of Fidelity Television, Inc. at 11, Joint App. at 205, *citing* Petersburg Television Corp., 19 F.C.C. 451 (1954), aff'd Southside Virginia Telecasting Corp. v. FCC, 97 U.S.App.D.C. 130, 228 F.2d 644, cert. denied, 350 U.S. 1001, 76 S.Ct. 546, 100 L.Ed. 865 (1956).

had complained of a lack of factual allegations to support the contention that the entire service area would be covered, the court states that the Commission's decision is controlled by Petersburg Television Corp., 19 F.C.C. 451, 464-65 (1954). The Court, noting a fact not mentioned by the Commission, states that Fidelity's list of interviewees contained only three interviews in Los Angeles proper? thus Fidelity "could . . . be found to have ignored the actual city of license in its planning" as was found in *Petersburg*. It is certainly true that the Commission does cite *Petersburg* for its holding–that a comparative demerit is awarded against an applicant who ignores a portion of its service area in formulating proposed programming–but it is equally clear that the Commission did not and could not have relied on that case to support its holding *sub judice* for the simple reason that the decision in *Petersburg* came *after a complete hearing into the programming issue*. The Commission in *Petersburg* found on the basis of one applicant's ascertainment survey, testimony and other evidence that the applicant ignored a portion of the service area in formulating its proposed programming. In this case, Fidelity's ascertainment survey was never introduced into evidence because no hearing was ever held. Fidelity was given no opportunity to contradict the court's factual finding about its intentions. Indeed, the court's citation of evidence ignores the fact that Fidelity also placed many thousands of telephone calls and sent many letters other than the interviews cited in its petition.[69]

[69] This was mentioned by the Hearing Examiner. *See* RKO General, Inc., 44 F.C.C.2d 149, 194, 224 (1969) (Hearing Exam.). *See also id.* at 195-199 (testimony supporting the specialized programming issue summarized). This fact is particularly crucial since Fidelity's petition was drawn with explicit reference to the *Petersburg* decision and sought to avoid the conclusion that it, Fidelity, like the unsuccessful applicant in *Petersburg*, meant to ignore part of the service area. *See* note 68 *supra*.

We do not know to whom those queries were directed because no hearing was ever held. The Commission, of course, avoided this issue by not, repeat not, referring to any inadequacies in Fidelity's ascertainment survey and instead simply stating that Fidelity had not made any factual allegations that it would in fact service the entire area. And, as I have argued, that holding may not be sustained. The court's finding of fact, couched in terms of what "could have been found", is clearly erroneous.

I conclude that these first three reasons are largely make weight. The fourth reason is the more serious since it incorporates the Commission's policy of correlating ascertainment efforts with proposed programming in order to put down a programming issue. Apparently, the FCC's position was that the data stated in Fidelity's petition did not sup-

The court mistakenly informs us, slip page 16 n. 14, ___ U.S. App.D.C. page ___, ___, F.2d page___ n. 14, that the Hearing Examiner would have found against Fidelity on the service philosophy issue. This statement is remarkable for several reasons, the first of which being that the Hearing Examiner could not find against Fidelity on an issue which had never been heard and upon which no record had been developed. A second problem with the court's assertion is that it misstates the Hearing Examiner's remark, which was that Fidelity's proposal might result in a further contribution to Los Angeles proper becoming "the hole in the doughnut of the surrounding communities." RKO General, Inc., 44 F.C.C.2d 149, 226 (1969) (Hearing Exam.). This remark is not a holding against Fidelity (and if it were, it might well be subject to challenge since no evidence is adduced in support of it and, of course, no hearing was held on the issue), but rather is one argument that counts against the specialized programming issue if in fact the specialized issue were to be used in the comparative hearing. It is noteworthy that this argument of the Hearing Examiner is directly inconsistent with the argument by the Commission that there is no evidence of any special local needs of the Southland to justify even hearing a specialized programming issue. RKO General, Inc., 5 F.C.C.2d 517, 519-20 (1966).

port its specialized programming proposals since the ascertainment survey did identify any community problems or needs to which the programming would relate. The most cursory reading of Fidelity's petition indicates that it has offered substantial proof that little if any television programming in Los Angeles is directed to the local interests of the Southland. I do not understand the Commission to dispute this. Rather, the argument is that the ascertainment survey has no evidence on what those local interests are and why they require a telecommunications outlet. This requirement as noted previously, originated in Commission attempts to control "promise" battles among applicants in regard to percentages of local affairs and news programming. Its rationale is seemingly not applicable in a "service philosophy" specialized programming issue since the Commission would surely presume that a local community has *some* telecommunications needs.[70] The whole allocations policy of the FCC, based on the perhaps mythical concept of "local service", is premised on that view. The only issue then is whether the area to which the "service philosophy" is

[70] In fact, the Commission later assigned a UHF channel to Anaheim expressly to meet the local needs of the Southland. Table of Assignments, 8 F.C.C.2d 736 (1967). The Brief for the Federal Communications Comm'n at 19 & n.8 states that Fidelity should not be permitted to have a service philosophy issue until it had petitioned for rulemaking to modify the table of assignments. But any failure in that regard was surely cured by the Commission's own actions in granting an assignment to Anaheim. Moreover, the Commission in ruling on Fidelity's petition did not state that Fidelity had chosen the wrong procedure to obtain a service philosophy issue and that it should have sought rulemaking. Rather, the petition was dismissed because Fidelity had not alleged sufficient facts that there was separate local needs of the Southland distinct from the remainder of the Los Angeles service area. RKO General, Inc., 5 F.C.C.2d 517, 519-20 (1966).

directed is in fact a distinct local community. After *WEFM* at least, I think the evidence in the ascertainment survey on the local interests of the Southland is sufficient to raise a substantial issue of fact on that question.[71] A review of Commission precedent in general on specialized programming hearings supports this conclusion.[72]

The court does not consider this issue of the relation of Fidelity's ascertainment survey to its specialized programming proposal, apparently content to rest its affirmance on the deficiencies it "finds" in Fidelity's survey even though that survey was not introduced in evidence and no hearing was held on it. The court does attempt to affirm a related Commission decision to deny Fidelity an opportunity to amend its petition after the Commission reformulated its pleading standards for proposed programming issues in Chapman Radio & Television Co., 7 F.C.C.2d 213 (1967). The court advises us that since it has "found" Fidelity's

[71] *See* the evidence adduced and apparently accepted by the Hearing Examiner, summarized RKO General, Inc., 44 F.C.C.2d 149, 194-99 (1969).

[72] *Compare* the analysis of Jimmie H. Howell, 46 F.C.C.2d 1150, 1153-54 (1973); Jay Sadow, 26 F.C.C.2d 940, 957-61 (1970); Harvit Broadcasting Corp., 18 F.C.C.2d 508 (1969); Jaco, Inc., 18 F.C.C.2d 219 (1969); Christian Broadcasting Ass'n, 16 F.C.C.2d 594 (1969); Salter Broadcasting Co., 8 F.C.C.2d 1036 (1967); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397 n.9 (1965); *cf.* La Fiesta Broadcasting Co., 6 F.C.C.2d 65, 67-74 (1966) *with* the following gneral service cases, Community Broadcasters, Inc., 33 F.C.C.2d 714, 719, 720 (1972); WSOQ, Inc., 20 F.C.C.2d 874, 875-76 (1969); City of Camden, 18 F.C.C.2d 412 (1969); Regal Broadcasting Corp., 14 F.C.C.2d 845, 847 (1968). *See also* Citizens Comm. to Save WEFM v. FCC, 166 U.S.App.D.C. ___, 506 F.2d 252, 280 & n.63 (1974) (Bazelon, C. J., concurring in the result) and authorities cited.

ascertainment survey inadequate, Fidelity could gain nothing from revising its petition in light of *Chapman* since its original survey was thus inadequate.[73] The Commission did not take this approach, of course, because the ascertainment survey was not in the record. Rather it refused to permit Fidelity to revise its petition because it interpreted Fidelity's petition for reconsideration as declaiming any desire to amend the original petition and as nothing more than a restatement of its substantive argument that an issue should have been set down.[74] This conclusion, however, is no less extraordinary than the court's since why else would Fidelity seek relief after *Chapman* if it did not at least think it could amend its petition to conform with *Chapman* and since Fidelity could not have complied with *Chapman* as that decision was not issued until after Fidelity's original petition was denied. So, the Commission changes the law on allegations of ascertainment and denies Fidelity a chance to comply because it assumes that Fidelity is not really able to comply. This reasoning does little to command our respect. I conclude that at the very least Fidelity should have been given an opportunity to revise its petition in light of *Chapman*.

[73] Slip page 18 n. 16, ___ U.S.App.D.C. page ___, ___ F.2d page ___ n. 16. The court may at this point be only referring to the general programming issue proposed by Fidelity.

[74] RKO General, Inc., 8 F.C.C.2d 880 (1967), clarif. denied, 10 F.C.C.2d 115, 117 (1967). It was in this last decision by the Review Board denying clarification of the Commission's action that the inadequacy of Fidelity's ascertainment issue was first raised. In mentioning this alleged inadequacy (after all the ascertainment survey was never in the record), the Review Board refers to previous "findings" of inadequacy. The Review Board provides no citation to such previous decision on the specialized programming issue. *See* RKO General, Inc., 5 F.C.C.2d 517, 519-20 (1966).

B. *First Amendment Implications of Consideration of Program Content*

Consideration of Fidelity's proposed specialized programming issue and also of RKO's past performance in programming Channel 9 in making a comparative decision raises significant First Amendment problems. I have discussed those problems at length previously[75] and intend here to only outline the tentative conclusions I have reached. The FCC may in a comparative hearing consider whether a particular programming proposal will need an unfulfilled community need and hence increase the overall diversity of programming in the viewing market. I take this to be a rather limited examination of program content and one which is consistent with Fidelity's specialized programming proposal. As I indicated previously, I am not comfortable with this conclusion but perceive no other possible result considering the present system of broadcast regulation.[76]

Far more difficult problems are encountered when one turns to the Commission's scrutiny of RKO's past programming. In this case, RKO was awarded neither a preference, or renewal expectancy nor a demerit because of its past programming. Fidelity vigorously challenges this conclusion, arguing that the evidence indicates that RKO should have been given a substantial demerit for past programming. This evidence tends to prove that RKO programmed very little news or local affairs, engaged in excessive commercialization and largely utilized old movies

[75] *See* Citizens Comm. to Save WEFM v. FCC, 166 U.S.App.D.C. ___, 506 F.2d 252, 268 (1974) (Bazelon, C. J., concurring in the result).

[76] *Id.* at 281-83. *See generally* Bazelon, *supra* note 31.

dealing with crime and violence.[77] I have no difficulty with a consideration of excessive commercialization in the decision whether to grant a renewal expectancy or a demerit.[78] As for the remainder of RKO's past programming, I am constrained to hold that the Commission may award a preference or demerit on the basis of a significant amount of actual journalism by the licensee without regard to the content of that journalism. I think this holding may be premised on those decisions erecting a Fairness obligation to report on controversial issues of public importance.[79] I am not presently informed, however, of

[77] *See* RKO General, Inc., 44 F.C.C.2d 149, 161-88 (1969) (Hearing Exam.) which collects most of the evidence Fidelity thinks is relevant to a determination on RKO's past performance. On the commercialization issue, *see* note 62 *supra*.

[78] *See* Citizens Comm. to Save WEFM v. FCC, 166 U.S.App.D.C. ___, 506 F.2d 252, 277 & n.40 (1974) (Bazelon, C. J., concurring in the result); Bazelon, *supra* note 31, at 229-34. It is not clear what the Commission found on commercialization but it does appear that the Commission did *not* award a comparative demerit or in any manner weigh overcommercialization against RKO.

[79] *See* Public Communications, Inc., 32 P & F Radio Reg.2d 319 (1974); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-51 (1949). *Cf.* Greater Boston Television Corp. v. FCC, 143 U.S.App. D.C. 383, 444 F.2d 841, 860 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed. 2d 701 (1971) (on the "editorializing" part of the journalistic function).

Of course, in enforcing such a standard of significant amounts of journalism the Commission should require strict requirements of pleading to ensure that percentage differences in programming among applicants truly relate to community needs. These pleadings requirements will protect applicants from the chilling effect of amorphous and unsubstantiated challenges and the costs incident to defense thereof. *See* National Broadcasting Co. v. FCC, ___ U.S.App.D.C. ___, ___ F.2d ___ (1975) (Bazelon, C. J., dissenting from the

any justification for review of the content of entertainment programming. Absent further explanation from the Commission, I would not think it proper to award a preference or a demerit on that basis. Since the Commission's decision is unclear on this point, I would remand for further consideration.[80] On the remand, the Commission could, of course, consider the extent to which RKO's entertainment programming meets unfulfilled community needs and hence contributes to overall diversity in making a comparative evaluation. Any renewal expectancies would of necessity be generated by this process of comparison. I realize this is an imperfect approach to the problem of permissible renewal expectancies; perhaps much more inclusive consideration of program content is required in order to securely grant a significant renewal expectancy. I simply do not know of any other approach. The Commission presently has the matter under advisement in a rulemaking proceeding.[81] Perhaps it will provide us with

order vacating the previous order granting rehearing *en banc*) at 600-01. The Commission at present recognizes such pleading requirements. *See* Chapman Radio & Television Co., 7 F.C.C.2d 213 (1967); slip page 22 & n.64, ___ U.S.App.D.C. ___, ___ F.2d ___ & n.64 *supra*.

[80] *See* Citizens Comm. to Keep Progressive Rock v. FCC, 156 U.S. App.D.C. 16, 478 F.2d 926, 929 (1973); Network Programming Inquiry, 20 P & F Radio Reg. 1901, 1907 (1960). The Hearing Examiner clearly weighed the alleged lack of "quality" in RKO's programming, RKO General, Inc., 44 F.C.C.2d 149, 162-69, 177-88 (1969), but but the Commission stated that it would not consider "quality" even though it also concluded that RKO's past performance was merely "average" (a conclusion which seems to indicate some quality judgment), 44 F.C.C.2d at 132-33.

[81] Formulation of Policies Relating to the Broadcast Renewal Applicant, 27 F.C.C.2d 580 (1971), amended, 31 F.C.C.2d 443 (1971), mandamus denied, Citizens Communications Center v. FCC, 149 U.S. App.D.C. 419, 463 F.2d 822 (1972).

some guidances in this difficult area. For the time being, I think this case should be remanded on the programming issue.

III. *Conclusion*

Former Commissioner Johnson, dissenting, stated that the "decision, granting RKO's renewal application for KHJ-TV in Los Angeles, may very well be the worst decision of this Commission during my term of seven years and five months."[82] Despite the intense competition for this honor, I am constrained to agree. The decision is so bad not because the Commission's substantive holding is wrong—although I have little doubt that it is—but because the fiercely technical and mechanical treatment of Fidelity's meritorious claims and the pervasive result-oriented reasoning completely strip off any veneer of rationality attaching to the comparative licensing decision. There is only one operative part of the Commission's decision. I quote it in full: "IT IS ORDERED: (d) That the application of RKO General Inc. for renewal of license . . . IS DEEMED TO BE GRANTED . . ."[83] The rest of the opinion is superfluous. It is wholly appropriate that the deciding vote was cast by Chairman Burch who simply concurred in the result. It would be easy to be alarmist about this decision, but I suppose that would be unwarranted. The same ability to bulldoze through administrative precedent that marks this case for unwanted distinction will be, I am sure, turned against the case itself. Perhaps it is this

[82] RKO General, Inc., 44 F.C.C.2d 123, 140 (1973) (Johnson, Comm'r, dissenting).

[83] *Id.* at 138. But the Commission even vacillated on this issue, later arguing that its decision was not a final order. Fidelity Television, Inc. v. FCC, 163 U.S.App.D.C. 441, 502 F.2d 443 (1974).

capacity for forgetfulness that enables the Commission to motor right along while I remain baffled and amazed at the turn of events in these comparative cases. I suppose I am naive to expect anything different.

But I remain curious as to why the court labors so valiantly to affirm this "foolish piece of business." The irrationality of the comparative hearing process has certainly been publicized enough by quite moderate observers.[84] Perhaps the court is of the opinion that this is not the "right case" to correct the irrationality of the comparative hearing process. The court's "clarification" of its original opinion suggests as much by repeated references to what it obviously has concluded are Fidelity's weaknesses as a licensee. The central weaknesses that the court perceives are that doubts have been raised as to Fidelity's candor and that its "service philosophy" is really an "artificial construct." I never would have believed the court would be so unfair to a litigant before it. Both of these points were *not in issue before the FCC since the Commission expressly refused to put down an issue as to each.* With absolutely no record on the candor of Fidelity or the *bona fides* of its specialized programming proposal, the court leaps to extraordinary conclusions. The "service philosophy" issue was patterned directly on a prior Commission decision. We may disagree on whether it fits the pattern, although there never was a hearing to find out, but to name it an "artificial construct" requires more righteousness and certitude than I can summon. The candor issue pertains to Fidelity's alleged failure to inform the Commission that some of its stock

[84] *See* Geller, A Modest Proposal for Modest Reform of the Federal Communications Commission, 63 Geo.L.J. 706, 715-18 (1975) and leading authorities cited which include Professor Jaffe, Judge Friendly, Professor Jones and a member of the panel that decided this case.

subscription agreements were signed by agents of the subscriber; and Fidelity's alleged failure to inform the Commission of certain changes made in its corporate structure. We have nothing, absolutely nothing, in this record to indicate that either existed or that they were more than technical or clerical errors. The fact that the Commission refused to set down an issue on the point certainly tells us something about the substantiality of the court's new found candor issue.

The court also points to the Hearing Examiner's colorful language describing Fidelity's lack of experience in broadcasting. No financial issue was put down against Fidelity. As I indicated previously, if lack of experience is a disqualification—and the Commission certainly did not, repeat did not, suggest that it was even a demerit—we might as well do away with the diversification guides. Let the networks own all the licenses; they have proven experience. The Hearing Examiner's penchant for hyperbole on the integration factor obscures the modesty of Fidelity's proposal and the express statement in the 1965 Policy Statement that past experience is not all that significant in weighing the integration factor. And, of course, the Commission took a completely different tack than did the Hearing Examiner in arguing that the integration proposal of Fidelity could not be implemented. The Hearing Examiner's rhetoric has absolutely no decisional significance. And all the court's enthusiasm for the Hearing Examiner obscures the fact that the Examiner recommended that the license be *granted to Fidelity*.

The court's characterization of Fidelity as a "nothing" applicant constitutes apparently a flailing effort to avoid what is clearly a dangerous precedent in comparative hearings. The ironic truth is that the court need not clutch at

such straws since we can be sure the Commission will manage to erect some ethereal distinction of this case that will prevent it from becoming a precedent in non-renewal comparative cases. But the court's characterization of Fidelity as a "nothing" applicant raises the question in my mind as to what the court would desire from a "something" applicant. Here Fidelity has an important diversification advantage which it seeks to translate into a specialized programming proposal; it seeks to modestly integrate ownership into management and is locally owned. It appears to me that this is exactly the kind of application whch we should find to be "something" indeed, a truly new voice in the highly concentrated telecommunications industry. Apparently the court requires experience in order for the applicant to be "something" but as I have said again and again in this statement and elsewhere, primary emphasis on past experience will forestall new entrants into the broadcasting field. And as we have said before, prior broadcast experience unlike concentration of control is remedial.[85] Perhaps the importance of Fidelity's application would be more apparent to the court if Fidelity had included members of minority groups among its stockholders.[86] The court seems antagonistic to Fidelity because its proposals promise much, as if the very making of a promise is suspect, a mere plóy to swipe an incumbent's license. But Fidelity has no alternative but to promise since it is a newcomer. Once more the court seems to place an excessive premium on past broadcast experience.

[85] Sunbeam Television Corp. v. FCC, 100 U.S.App.D.C. 82, 243 F.2d 26, 29 n. 6 (1957).

[86] *Compare* Garrett v. FCC, 167 U.S.App.D.C. ___, 513 F.2d 1056 (1975); TV 9, Inc. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

Perhaps what makes the court's opinion so difficult for me is the realization that this debate between diversification and past experience is a repetition of a battle I thought had been fought and won long ago. In 1958, seventeen years past, I criticized the Commission thus:[87]

> I think that by . . . attributing to these by-products of concentration [*e. g.* past experience] a greater degree of importance than it attributes to the traditional, and antipodal, preference for decentralization of ownership of the mass media of communication, the Commission has effectively nullified the diversification and anti-monopoly policy long since recognized as 'one of the basic underlying considerations in the enactment of the Communications Act.'
>
> There may be cases in which the Commission can properly find that experience resulting from an applicant's ownership of communications facilities offsets a competing applicant's freedom from ownership of other communication interests. But 'Commission expertise alone cannot support so pivotal (a divergence)' from basic communications philosophy. A convincing explanation is required.

[87] Tennessee Television, Inc. v. FCC, 104 U.S.App.D.C. 316, 262 F.2d 28, 32-33 (1958) (Bazelon, J., dissenting). *See also* Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956). The arguments in my dissents in these two cases were seemingly adopted by the Commission in its Policy Statement on Comparative Broadcast Hearings, 5 F.C.C.2d 393, 394-95 (1965); *see* Terre Haute Broadcasting Corp., 25 F.C.C.2d 348, 353-55 (1970); sources cited notes 35, 38 *supra*.

I do not think either the court or the Commission offers such an explanation. Rather we are regaled with all the advantages of experience and all the advantages of diversification are quietly but securely swept under the rug.

As with the last battle, this repetition of it will be won or lost by future appointments to the Federal Communications Commission and whether those appointments arrive, like those in the early 1960's, with a desire to reduce the concentration of control of the telecommunications industry. But what do we say to the owners of Fidelity in the meantime?

This question is not merely personal. Reliance on judicial techniques of reasoned judgment lends to the comparative decision process an expectation of rationality and predictability. Perhaps naively, the owners of Fidelity relied on that expectation and spent a good deal of money in the process of that reliance. Fidelity, too, is entitled to its "challenge expectancies" of a fair and rational comparative process. I simply cannot believe that serious students of communications policy would conclude that expectation has been fulfilled in this case.

This injustice leads me to further question whether we ought not give up the pretense that the comparative evaluation is a rational process but is instead a "legislative" type decision which may be made on the basis of any reasons or no reasons perceived dimly or not at all by the decision-maker.[88]

[88] Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 230 F.2d 204, 206, cert. denied, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Prettyman, J.):

> The decisive factors in comparable [sic] selections may well vary . . . And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are anot for the judiciary.

If we fail to take this approach and yet continue to affirm cases such as the one *sub judice*, we will only be leaning together the shards of a rotten building through the legitimation of appellate review. If we adopt an approach more compatible with the Commission's present posture and give up the illusion of serious appellate review, we will at least be aware of the choices we face in this difficult area of policy, implicating both the values of protection of small business and free enterprise in a competitive system.[89] And we will thereby displace any expectations of rationality possibly held by challengers and renewal applicants alike. Any other approach may give us the illusion that all is well, that the choices may be handled within the present rational structure, when in fact we know, from this case at least, that no such rational structure exists.

[89] *Compare* Carroll Broadcasting Co. v. FCC, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958) *with* slip pages 11-17, ___ U.S.App.D.C. pages ___-___, ___ F.2d pages ___ - ___, *supra*.

F.C.C. 73-1263

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RKO GENERAL, INC. (KHJ-TV), LOS ANGELES, CALIF. For Renewal of Broadcast License	Docket No. 16679 File No. BRCT-58
FIDELITY TELEVISION, INC., NORWALK, CALIF. For Construction Permit for New Television Broadcast Station	Docket No. 16680 File No. BPCT-3655

APPEARANCES

Harold David Cohen, William S. Green, and *J. Laurent Scharff*, on behalf of RKO General, Inc.; *Edward P. Morgan, Robert N. Green*, and *Walter H. Sweeney*, on behalf of Fidelity Television, Inc.; *Anthony J. Sobczak, John F. Reilly*, and *Thomas B. Fitzpatrick*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission; and *Keith I. Clearwaters* and *Peter C. Carstensen* on behalf of the Department of Justice, *amicus curiae*.

DECISION

(Adopted November 30, 1973; Released December 6, 1973)

BY COMMISSIONER ROBERT E. LEE FOR THE COMMISSION:[1] CHAIRMAN BURCH CONCURRING IN THE RESULT; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS WILEY AND HOOKS NOT PARTICIPATING.

BACKGROUND

1. On August 31, 1965, RKO filed an application for renewal of license covering its station KHJ-TV on Channel 9 in Los Angeles. On October 25, 1965, Fidelity filed an application for a construction permit for a new television station to operate on Channel 9 in Norwalk, California. On June 8, 1966, the Commission issued an order (FCC 66-503) finding both the RKO and Fidelity applications qualified for grant and also finding them mutually exclusive. Hearing was directed on these issues:

1. To determine which of the proposals would better serve the public interest.

[1] Commissioner Reid, who did not hear oral argument, has read the transcript of the oral argument and is participating in this Decision pursuant to Section 1.277 (f) of the Rules.

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2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order carried the following footnote to the designation clause:

"[2] The Commission in its *Policy Statement on Comparative Broadcast Hearings*, (FCC 65-689, released July 28, 1965, 30 F.R. 9660, 5 RR 2d 1901), indicated that it did not therein attempt to deal with '. . . the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.' That remains our position. However, we have also, subsequently indicated (*Seven (7) League Productions, Inc., et al.*, 1 FCC 2d 1597-9) that the Policy Statement will govern the introduction of evidence where a renewal application is being contested. For example, as in regular comparative hearings, evidence relating to programming proposals and to character will not be entertained in the contested renewal proceeding unless first specifically put in issue by the Hearing Order or on subsequent enlargement of issues upon a threshold factual showing that a distinctive difference or deficiency exists and is worth exploring. We have not, however, reached any determinations as to weight to be accorded various factors of difference between the renewal applicant and the competing applicant, preferring instead to do so later upon the full, factual hearing record that is developed by competent evidence under the designated issues. According[ly], parties in a contested renewal proceeding are free to urge any arguments they may deem applicable concerning the relative weight to be afforded the evidence bearing on the various comparative factors developed at hearing."

2. The history of this proceeding until September 9, 1968, is set forth in paragraphs 3-19 of the Initial Decision (FCC 69D-43, released August 13, 1969) of Hearing Examiner Thomas H. Donahue,[2] which paragraphs we adopt and incorporate by reference as fully as if set forth at length herein. Of particular note is the attempt of Fidelity to include, in the issues and the record, material pertaining to a civil anti-trust suit [3] against General Tire and Rubber Company (the corporate parent of RKO General, Inc.), filed March 2, 1967, which dealt generally with the matter of reciprocal dealing allegedly engaged in by General Tire and its subsidiaries. Fidelity, on March 8, 1967, petitioned to enlarge the issues to explore the subject matter of the civil suit. While denying the specific request to enlarge the issues, on June 9, 1967, 8 FCC 2d 632, the Review Board amended the order of designation to include a provision that the outcome of the comparative proceeding in Los Angeles (KHJ-TV) would be "without prejudice to whatever action, if any," the Commission might deem appropriate as a result of the Ohio civil action and held that the relevant facts and circumstances could be adduced by Fidelity under the standard comparative issue. The Hearing Examiner reopened the proceeding on March 11, 1968, to receive evidence on reciprocal dealing which had been developing in the civil antitrust action, "with the caveat that such evidence must be patently germane to RKO's stewardship of KHJ-TV * * *." The Commission later sustained the Board's refusal to add a specific evidentiary issue, FCC 68-892, 14 RR 2d 90, stating that the Examiner's action had afforded Fidelity essentially the relief it sought. However, on its own motion, the Commission added a potential disqualification issue, to wit:

> To determine, in light of the evidence adduced with respect to the preceding issues, whether RKO General, Inc. should be disqualified or, if not, whether a comparative demerit should be assessed against it in this proceeding.

3. On August 13, 1969, the Initial Decision was released in this proceeding. The Hearing Examiner recommended granting Fidelity

[2] Now known as Administrative Law Judges. Mr. Donahue retired before the change of nomenclature, and he will be referred to as Hearing Examiner.

[3] *U.S. v. The General Tire and Rubber Company, et al.*, Civil Action No. C-67-155, U.S. D.C., Northern District of Ohio, Eastern Division (erroneously cited in the Initial Decision as 6-67-155).

and denying RKO.[4] Exceptions and a brief were filed by Fidelity on December 12, 1969. Exceptions and a request to file a brief in excess of the page length permitted by Commission rules and the brief were filed and lodged[5] respectively by RKO on December 12, 1969. Reply briefs were filed June 5, 1970, by both Fidelity and RKO, and an erratum was filed by RKO on June 23, 1970. The Department of Justice lodged a brief, *amicus curiae*, on June 10, 1970, pertinent to the qualifications of RKO only insofar as they might be affected by the "reciprocal dealings" matter, together with a corrected page submitted June 11, 1970; a reply brief was filed by RKO on July 20, 1970; and a memorandum in response was filed by the Department of Justice on August 10, 1970.[6]

4. Meanwhile, on December 3, 1969, the Commission designated the renewal application of RKO General, Inc. for Channel 7, Boston, Massachusetts (WNAC–TV), for hearing with two competing applications.[7] The issues included, *inter alia*:

> 3. To determine with respect to the application of RKO General, Inc., whether in view of the evidence concerning alleged anticompetitive practices by RKO General, Inc., or its parent corporation, General Tire and Rubber Co., RKO General, Inc. should be disqualified to remain a licensee of the Commission or if not so disqualified, whether a comparative demerit should be assessed against it in this [Boston] proceeding.

The order provided that official notice might be taken of the record in the Los Angeles KHJ–TV proceeding and that only new or additional evidence not adduced in this proceeding might be adduced in the Boston proceeding. It also included provisions that, in the event of a grant for WNAC–TV, the grant would be subject to whatever action the Commission deemed appropriate as a result of the pending civil antitrust suit and the developments and findings in the proceeding before the Commission involving the renewal of KHJ–TV's license.

5. The antitrust action in the United States District Court was, however, terminated on October 22, 1970, by a consent judgment. Consequently, the Commission does not have the benefit of any findings therefrom, and the reservation by the Commission of the right to predicate action in the RKO renewal proceedings on the outcome of the civil suit has become a nullity. Thereafter, on September 10, 1971, Fidelity petitioned the Commission to take official notice of the consent judgment. The Commission did so,[8] noting that, while this matter had previously been subject to any action the Commission might deem appropriate as a result of a final adjudication in the civil suit, this proviso no longer obtained and that the resolution of this case would be based on the record developed in the proceedings before the Commission.

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[4] Except as modified herein and by the rulings on exceptions which are attached as an appendix, the findings of fact set forth by the Examiner in his Initial Decision are adopted. However, since we do not agree with his ultimate determination, the conclusions set forth herein will be substituted for those of the Examiner.

[5] The brief of excess page length was accepted for filing by the Commission's Memorandum Opinion and Order, 31 FCC 2d 70 (1971).

[6] The brief, *amicus curiae*, and the pleadings responsive thereto were also accepted for filing, *ibid.*

[7] 20 FCC 2d 846 (1969).

[8] FCC 71-970, released September 20, 1971.

6. During the same period, the Broadcast Bureau also sought to reopen the KHJ–TV record for the introduction of additional evidence. It alleged that there was then available considerably more evidence bearing on the anticompetitive activities of General Tire, RKO General, Inc., and their subsidiaries and affiliates than was available when the anticompetitive phase of the Los Angeles hearing was in progress. While the Broadcast Bureau indicated a preference for reopening the Los Angeles record with an issue identical to that in the Boston proceeding, it suggested, as a possible alternative, that the outcome of the Los Angeles proceeding could be made dependent upon the final result of the anticompetitive issue in the Boston proceeding in a manner similar to that in which the ultimate result of the civil antitrust suit might have been used. The Broadcast Bureau's petition further referred to another petition pending before the Review Board to add issues in the Boston proceeding to determine whether certain officers, employees and former employees of General Tire and RKO had misrepresented or concealed facts, or been lacking in candor in their testimony concerning reciprocal trade practices when testifying in the Los Angeles proceeding and, if so, whether RKO should be disqualified as a licensee in Boston or assessed a comparative demerit. The Bureau requested that the Commission either direct the Review Board to add such issues to the Los Angeles proceeding or add them itself.

7. In the interval after the Bureau's filing, the Review Board acted upon the pleadings before it and added the following issues to the Boston proceeding:[9]

> (a) To determine whether in sworn testimony given in the course of the KHJ–TV proceeding, Docket Nos. 16679–16680, officers, employees, and/or former employees of General Tire and Rubber Company, or of RKO General, Inc., misrepresented facts, concealed facts, or were lacking in candor with regard to the existence, nature, and extent of reciprocal trade practices engaged in by General Tire and Rubber Company and RKO General, Inc.; and
>
> (b) To determine in light of the evidence adduced pursuant to the aforementioned issue whether RKO General, Inc. should be disqualified as licensee of WNAC–TV or, alternatively, assessed a comparative demerit.

After consideration of all of the circumstances, the Commission concluded[10] that no useful purpose would be served by reopening the record in this proceeding. Rather, the Commission modified the second issue added by the Board, *supra*, in the Boston proceeding to determine whether RKO should be disqualified as a licensee, made Fidelity a party to the Boston proceeding insofar as the issues therein pertained to RKO's licensee qualification, and stated that, in the event RKO was found on a comparative basis to be the preferable applicant herein, the issuance of a final decision would be deferred until the conclusion of the Boston proceeding when such action as then appeared appropriate would be taken. Oral argument was scheduled and held before the Commission, *en banc*, on October 12, 1971.

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[9] 30 FCC 2d 138 (1971).

[10] 31 FCC 2d 70 (1971), paras. 8 and 17.

8. On June 11, 1973, the United States Court of Appeals for the District of Columbia Circuit issued an Order [11] reciting that Fidelity Television, Inc. had petitioned the court for a writ of mandamus to compel the Commission to issue a decision in this proceeding. The Court, while declining to issue such a writ, stated that the Commission's decision appeared to have been unreasonably delayed, that the Commission would likely act in accordance with the views expressed without issuance of a writ, and that a report of the Commission's action should be filed with the Court within thirty days. On July 2, 1973, the Commission held a special meeting and determined that a decision herein would be prepared as expeditiously as possible. This action was duly reported to the Court on July 6, 1973.

PRELIMINARY MATTERS

9. On August 16, 1971, RKO filed a petition to dismiss Fidelity's application or, alternatively, to enlarge the issues and reopen the record for further hearing.[12] RKO's petition is founded upon a petition for leave to amend which Fidelity filed on August 5, 1971, and which was granted by the Commission's Memorandum Opinion and Order, 31 FCC 2d 919 (1971). In substance, RKO asserts that Fidelity's amendment reflects a fundamental change in its corporate structure which had been in effect for at least 17 months and that Fidelity had thus been in gross dereliction of its duty to inform the Commission within 30 days of any substantial and significant changes involving its application, as required by Section 1.65 of the Commission's Rules. Subsequently, RKO filed a motion to supplement its petition against Fidelity,[13] urging that, in a petition for leave to amend filed by Fidelity on April 6, 1973, Fidelity finally informed the Commission of the acquisition by one of its stockholders of certain newspaper interests in May, 1972.

10. Without further discussion of the parties' extensive pleadings, we are convinced that Fidelity's failure to report changes in its corporate structure and acquisition of newspaper interests by one of its stockholders within the 30-day period provided by Section 1.65 raises very serious questions. Since our disposition of a case of this nature is based on the record compiled by the parties, all applicants have a continuing obligation to report any changes bearing on their comparative qualifications, and any failure to do so reflects adversely upon that applicant. Here, based on Fidelity's repeated inability to keep the Commission informed of the changes concerning its proposal, we would ordinarily enlarge the issues and remand for a further hearing to determine all of the facts surrounding these incidents and their impact upon both the basic and comparative qualifications of Fidelity before considering a

[11] Case No. 73-1313.

[12] RKO filed a supplement to its petition on August 23, 1971; Fidelity filed an opposition on August 26, 1971, which was supplemented by a letter filed November 4, 1971; the Chief, Broadcast Bureau, filed comments on August 31, 1971; RKO filed a reply on September 8, 1971; Fidelity filed a supplement to its opposition on September 13, 1971; and RKO filed both a motion for leave to file a response and a response to Fidelity's supplement on September 21, 1971. In view of the disposition of RKO's underlying petition, its request for leave to file a response will be dismissed as moot.

[13] RKO's supplement was filed on April 25, 1973; Fidelity filed an opposition on May 7, 1973; and the Chief, Broadcast Bureau, filed comments on May 8, 1973.

grant of its application. *Cf. Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175 (Rev. Bd. 1970).

11. However, it now appears that any further delay in the resolution of this case would be inappropriate. Thus, while we might have preferred to base our Decision on a more complete record in an ordinary case, we believe the circumstances here require us to go forward on the present record. When this fact is considered in the light of the ultimate conclusions to be drawn from the existing record, we are convinced that no useful purpose would be served by any further consideration of the Section 1.65 questions and that RKO's pleadings should be dismissed as moot. In order for the record to reflect the facts as they actually exist, however, we shall grant the petition for leave to amend filed by Fidelity on April 6, 1973.

12. On November 16, 1971, Fidelity filed a request for official notice,[14] urging the Commission, without reopening the record, to take account of the facts that an RKO subsidiary was granted a CATV system franchise for Inglewood, California, which is within the predicted Grade B contour of KHJ-TV. In response, RKO points out that the CATV system never became operational and that it has been assigned to a third party. Subsequently, RKO filed a petition for leave to amend on December 14, 1972, to provide a current compilation of its media interests, including CATV properties.[15] As we stated in *TV Signal Company of Aberdeen*, 23 FCC 2d 603 (1970), renewal applicants should report their interests in both operating and nonoperating CATV systems. Thus, we shall grant RKO's petition for leave to amend and Fidelity's request for official notice so that the record will reflect the relevant facts as accurately as possible.[16]

TRADE PRACTICES INVOLVING KHJ-TV

13. This matter originally arose out of the civil action filed by the Department of Justice against General Tire and three of its subsidiaries, including RKO, alleging that they had violated the Sherman Antitrust Act by conspiring to force their suppliers to purchase products and services from them. However, that action was ultimately terminated by the issuance of a consent decree which precludes General Tire and its subsidiaries from taking certain actions in the future without finding that they had engaged in such conduct at any time in

[14] In connection with this request, Fidelity filed a letter on October 19, 1971; RKO filed a letter in response on November 1, 1971; RKO filed an opposition to the request for official notice on December 1, 1971; Fidelity filed both a request to file additional pleading and a reply on December 6, 1971; RKO filed an opposition to Fidelity's request to file additional pleading; and Fidelity filed a supplement to its request for official notice on January 19, 1972. We shall grant Fidelity's request to file an additional pleading so that the record will fully reflect its position on this question.

[15] In an opposition filed December 22, 1972, Fidelity objects that RKO may have improperly delayed in reporting its CATV interests. However, Fidelity, providing no factual support for its contention, relies on mere speculation which requires no further consideration at this time.

[16] Other petitions for leave to amend were filed by Fidelity on July 18, 1972; and by RKO on January 27, March 9, June 23, July 7, July 17, and September 5, 1972, and on February 8, March 15, April 19, May 1, May 10, June 29 July 30, September 4, September 21, and November 14, 1973. Fidelity filed comments on RKO's March 9, 1972 petition, urging that the proposed amendment should not be allowed to improve RKO's status in this proceeding. Since no applicant in a comparative hearing is allowed to gain a comparative advantage by relying upon an amendment submitted after the hearing has begun, see *Flower City Television Corp.*, 4 FCC 2d 384 (1966), and since the record should fully reflect the actual facts, we shall grant all of the petitions listed above.

the past. In spite of this circumstance, evidence bearing on the question was adduced during the course of this proceeding. As noted above, the impact of this and other evidence on RKO's general licensee qualifications is at issue in the Boston, WNAC–TV renewal proceeding which is not yet before us, and, thus, our present consideration will be limited solely to those matters involving RKO's operation of KHJ–TV.[17]

14. During the early 1960's, both General Tire and RKO established employee positions to carry out trade relations activities to improve customer and supplier relationships. The functions of these positions included seeking new markets and customers for their products and new sources of supply for goods which they purchased, gathering and analyzing information of commercial and trade developments, and facilitating intercorporate communications. On occasion, these employees also contacted counterpart personnel of other companies to provide an entry for their own salesmen or to obtain review of an earlier refusal to do business, which might lead to institution of or an increase in the companies' mutual patronage. Because each party to such an arrangement is both a supplier and a purchaser of goods or services, it is often described as a reciprocal trade practice or reciprocal dealing, without regard to the nature of the factors which prompted the parties to enter into the agreement.

15. While it has clearly been established that mutual patronage resulting from either coercion or threats of reprisal is an unfair trade practice,[18] neither the Department of Justice nor the Broadcast Bureau [19] claims that such conduct occurred here, and, on the basis of our own review of this record, we are convinced that there is no significant evidence establishing that KHJ–TV either engaged in or was the beneficiary of any unfair trade practice of that sort. On the other hand, we do recognize that KHJ–TV was involved in a number of mutual patronage situations during this period, as would be normal for any separate entity of a large conglomerate such as General Tire. Thus, the question here is not whether reciprocal dealing was practiced with respect to KHJ–TV,[20] but whether this conduct should reflect adversely upon the operation of the station.

16. For the reasons set forth below, we do not believe that such a conclusion is warranted in this case. As the Review Board previously noted, 8 FCC 2d 632 (1967), note 4, the civil suit against General Tire and RKO was the first case to raise the question of whether reciprocal dealing, standing alone, violates the antitrust laws. Since that suit was ultimately dismissed without any determination that improprieties had occurred, the legal questions therein were never resolved. In view of the circumstances that the relevant legal and economic concepts

[17] While we would have preferred and had intended to wait for the completion of the Boston proceeding before acting on KHJ–TV's renewal so that all of the questions about RKO's qualifications could be resolved at one time, we believe, for the reasons stated in paragraph 11, above, that this proceeding must now be decided without further delay.

[18] See, for example, *Waugh Equipment Company*, 15 FTC 232 (1931).

[19] Broadcast Bureau's proposed findings of fact and conclusions of law on reopened record, filed on January 31, 1969.

[20] Although a distinction can be drawn between mutual patronage which results from genuine, independent determinations that the other party offers the "best buy" and that which results from a voluntary agreement of the parties to do business with each other without regard to the advantages offered by other suppliers, we are not persuaded that the evidence in the present record is adequate to determine the intent of the parties as to the limited amount of KHJ–TV's advertising in question.

were in a state of flux at the time covered by this record, that neither responsible officials nor the courts had given any clear explanation of the applicability of the broadly drawn statutes, and that there was accordingly no certainty that trade relations practices were improper, we find no present basis for charging RKO with knowing and willful misconduct.

17. In this connection, while we do not wish to suggest that evidence hereafter of reciprocal dealing intended to gain an anticompetitive advantage would be condoned or excused, it is important to note that many other corporations engaged in similar trade relations practices during this period and that the Department of Justice terminated its civil antitrust suit on the basis of injunctive provisions which are essentially prospective in nature. When these facts are considered in the light of RKO's unblemished record as a broadcaster covering more than 25 years, we are not persuaded that the record in this case is sufficient to raise any meaningful question about RKO's willingness and ability to act in a responsible manner in performing its obligations as a licensee in the future. Thus, we are convinced that there is no reason, on the limited record of the trade relations practices involving KHJ–TV now before us,[21] either to disqualify RKO as the licensee of KHJ–TV or to assess a comparative demerit against its proposal in this proceeding.

KHJ–TV'S PAST BROADCAST RECORD

18. In the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, the Commission stated that no preference would be given for a past broadcast record within the bounds of average performance, since average future performance is expected of all licensees. The Commission also noted that an unusually good record could be shown by special attention for the public's needs and interests reflected by changing programming to meet the area's evolving needs, but that an unusually poor record may be established where there has been a failure to meet the public's needs and interests. Thereafter, the Court of Appeals held in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 22 RR 2d 2001 (1971), that incumbent licensees should be judged primarily on their records of past performance, that insubstantial past performance should preclude renewal of a license, but that superior performance should be a plus of major significance in renewal proceedings.

19. In this proceeding, KHJ–TV operates without a network affiliation in a market with seven commercial VHF television stations. Analysis of KHJ–TV's composite week for the license period, December 1, 1962, to November 30, 1965, shows that the station carried 86.5% entertainment programming; 3.375% news; 3.75% educational; 3% talks; 3.375% religious, agricultural, and discussion; and 7.13% live programming, with 5% in prime time,[22] and that it broadcast 1,132

[21] In our view, the mutual patronage advertising carried on KHJ–TV was not sufficient, in any event, to fall within the "not insubstantial amount" of affected commerce test as discussed in *United States* v. *General Dynamics Corporation*, 258 F. Supp. 36, 66 (1966).

[22] In comparison with the three other independent VHF television stations in the market, KHJ–TV during this period had the highest percentage of entertainment programming, the lowest percentages in the news and discussion categories, and the lowest percentages of live programming, for both the total day and prime time.

commercial spot announcements, averaging slightly more than 8 per hour.

20. The record in this proceeding establishes that RKO was the first licensee to use a motion picture studio's film library as a regular source of entertainment programming on a daily basis, that KHJ-TV pioneered in the implementation of this innovation in its market, and that the presentation of these feature films on a continuing basis fulfilled a genuine need in the Los Angeles area during the license period. Among the fims carried by KHJ-TV in response to this need were a series of Spanish language movies, several operas, and a variety of highly acclaimed motion pictures. The station also carried a number of plays produced by the British Broadcasting Corporation, a series called "Play of the Week," and several other cultural programs. In addition, KHJ-TV produced and broadcast programs involving Hollywood Bowl concerts, the Los Angeles Symphony Orchestra, the Los Angeles Art Museum, the UCLA Art Center, and other artistic presentations. Other programs were devoted to popular music and personalities, local parade highlights, beauty pageants, and similar events.

21. In this connection, KHJ-TV has received various awards and commendations for its programming during the license period from the Hollywood Chapter of the Academy of Television Arts and Sciences, the National Association for Better Broadcasting, the Los Angeles City Council, and other groups and community leaders. A number of individuals also expressed favorable comments about the operation of the station. However, among the many films presented by KHJ-TV,[23] the movies, "Jack the Ripper," "Pretty Boy Floyd" and "House of Wax," were shown numerous times during children's viewing hours in July and September, 1964. Each of these films included scenes of crime and violence, generating a series of public complaints by the National Association for Better Radio and Television, the Los Angeles Council of United Church Women, Congressman Lionel Van Deerlin, and several other persons.

22. Turning to the other aspects of KHJ-TV's performance, its record of public affairs programming included a series of programs on selected Greater Los Angeles cities with problems common to much or all of the area, on the scene reports and interviews from ten Western Hemisphere nations, a regular weekday discussion program presented in mid-afternoon and edited for repetition in prime time, and a wide range of documentaries and public service programs produced by other stations. A series of taped educational programs produced by local educators was also broadcast five days a week at 11:30 a.m. and sometimes repeated late at night. KHJ-TV's agricultural programming, however, consisted of a 30-minute film produced by the Department of Agriculture, which was shown on Saturday mornings. The religious programming included a number of filmed programs and short taped inspirational messages which were presented at the beginning and end of each broadcast day. A large portion of KHJ-

[23] Various syndicated programs and 48 feature films took up 113 hours and 41 minutes of the 133 hours and 40 minutes of the station's programming during the composite week. For the entire license period, a total of 1,454 movies, not including ones listed as "to be announced" or Spanish films shown on Saturdays, were carried at least 6,534 times. Of those movies, 66 were shown from 12 to 21 times.

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TV's talk programs was devoted to interviews in conjunction with its feature films and sports events.

23. The station also has a well equipped newsroom and mobile facilities which have been used in its coverage of news conferences and governmental meetings, and KHJ-TV has availed itself of the service from the Washington News Bureau operated by RKO, which is one of the few licensees—aside from the national networks—to maintain such a national news office.[24] The station has preempted its regular programming to provide live coverage of both local and national emergency situations, and it initiated television coverage of many sports events in the Los Angeles area. Finally, it should be noted that the programming discussed above was reported without any significant inaccuracy, that KHJ-TV's performance during the license period was entirely consistent with the representations made in its 1962 renewal application as to categories, amounts, and kinds of programming and the number of commercial announcements, and that the promises made in 1962 were deemed sufficient at that time to satisfy the public interest requirement of the Communications Act.

24. In assessing KHJ-TV's past broadcast record, we are initially convinced that it would be neither proper nor feasible for us to attempt to evaluate the quality of individual programs. The function of the Federal Communications Commission is not to sit as a critic or censor dictating what viewers across the country see, but rather to encourage licensees to ascertain the needs and interests of their audiences and to offer those audiences an opportunity to enjoy a broad variety of programming, with the market place serving as the final arbiter as to the value of a specific broadcast. By the same token, since every program will not be received with the same degree of approval by the public, we recognize that it is not uncommon for licensees to receive complaints from time to time. Indeed, it is clear that this is the unavoidable result of the freedom given to licensees to present programming recognizing the many different tastes of their audiences, and thus the mere fact that complaints have been filed is not necessarily significant.

25. This is not to say, however, that evidence of public dissatisfaction can be ignored. If a licensee continually disregards a significant trend of public opinion expressed over a substantial period of time and a growing number of viewers raise substantial objections to a licensee's programming practices without any change resulting from the reaction in the market place, we would of course be concerned about the licensee's failure to be responsive to his audience's expressed needs and interests. But where the licensee has made a good faith effort to satisfy various segments of the public, we are not persuaded that significant weight should be placed on the fact that not all members of the public were equally pleased with every program broadcast by the licensee.[25] To hold otherwise, we are convinced, could only generate

[24] KHJ-TV's news programming, which varied in length and frequency from time to time during the license period and which did not include any editorial commentary, generally consisted of one minute capsules in the morning and early afternoon, a five minute newscast in midafternoon, a fifteen minute newscast in the evening, and about fifteen minutes of news late at night.

[25] In this connection, Fidelity's efforts to find fault with KHJ's programming must also be considered and evaluated in the perspective of the facts that an incumbent licensee is always subject to criticism and that its weak points, no matter how insignificant, will be highlighted by a challenger in this type of proceeding.

pressures upon licensees, contrary to the public interest, to present a bland, uniform type of programming which would be inoffensive to all, but neither stimulating nor fulfilling for any. Indeed, in our view, such a development, diminishing rather than enhancing the freedom of our society, would be a tragic result.

26. In this case, although the record contains evidence of dissatisfaction, concerning KHJ-TV's feature film programming practices, there were also significant expressions of support for its policies from the public, and thus we do not believe that there is any present basis for drawing a conclusion adverse to KHJ-TV in this respect. As for the other aspects of its record, while we recognize that there are some aspects of its performance which may not warrant favorable consideration, the station should be given credit for its locally produced cultural and artistic programs and other entertainment specials which were broadcast in prime time. Furthermore, it must be noted that KHJ-TV's commercial policies conformed with the Television Code of the National Association of Broadcasters and that its actual broadcast performance met or exceeded in all respects the promises which it made in its 1962 renewal application. In this connection, it must also be remembered that KHJ-TV is not affiliated with any television network, that the station is competing in a market with six other commercial VHF facilities, and that its programming was supported by a significant segment of the public. Under these circumstances, we are persuaded that there are sufficient good points to offset the less favorable aspects of KHJ-TV's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus warranting neither a preference nor a demerit.

DIVERSIFICATION

27. The record to be considered in making the comparison under this criterion reflects that RKO, in addition to KHJ-TV, owns and operates AM and FM broadcast stations in Los Angeles and AM, FM, and TV stations in other cities across the country and that it has interests in numerous CATV systems and other media related enterprises in various parts of the nation. Although neither Fidelity nor its stockholders has any interest in an existing broadcast facility, one stockholder does have a 10% interest in a CATV system, and another stockholder has a 26% interest in a corporation publishing newspapers in several suburbs in the Los Angeles area.[26] Within KHJ-TV's Grade B contour, there are two daily newspapers of general circulation, 69 other daily newspapers, and 281 newspapers published one or more times each week; a total of 15 commercial television stations have been assigned to the Los Angeles market; and there are 62 AM and 64 FM stations serving areas within or near KHJ-TV's Grade B contour.

28. In addition to these matters, we believe that consideration must also be given to the facts that there is no evidence in this proceeding of any attempt by RKO to influence the operation of KHJ-TV in such a way as to promote any national or other uniform expression of po-

[26] See paragraphs 9-11, above.

litical, economic, or social opinion; that there has been no pattern in the public affairs programming of RKO's stations which would justify the assessment of any kind of a demerit; and, indeed, that KHJ-TV's access to RKO's Washington News Bureau and public affairs programming has actually increased the sources of information available to Los Angeles viewers. Thus, although RKO clearly has more media interests than Fidelity, we are not persuaded that the nature of RKO's interests is such as to have any adverse effect on the flow of information for the audience to be served here.

29. At the same time, while the full impact of Fidelity's recently acquired newspaper interest on this proceeding could not be finally determined without a further hearing, it is now apparent that Fidelity is no longer free of any connection with the publication of local newspapers and that this development diminishes to some extent the attractiveness of its proposal in this comparative analysis. Finally, it must be noted that there is a plethora of outlets for diverse and antagonistic views already in existence in this area, that RKO's ownership of KHJ-TV has been in compliance with the Commission's regulations and consistent with the public interest at all times since the station was acquired, and that the renewal of the license will not increase the concentration of media ownership in any way. In this connection, we also believe, as we have noted previously, that any attempt to restructure ownership patterns in the broadcast industry should be done by rule making, with general applicability, protection of all parties, and appropriate arrangements for divestment, rather than by an *ad hoc* interpretation of the diversification, or any other, criterion in a comparative renewal proceeding. See *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 31 FCC 2d 443 (1971). Under these circumstances, we are convinced that neither applicant has made a sufficient showing to warrant the award of any preference under the diversification criterion. *Cf., Farragut Television Corporation*, 8 FCC 2d 279 (1967).

PARTICIPATION IN STATION OPERATION

30. Fidelity proposes that William G. Simon, President, General Manager and 20.6% stockholder, and Nello C. Di Corpo, Director of Public Service Programming and 2.06% stockholder, will devote full time to the operation of its planned television station.[27] Simon has lived in the Los Angeles area since 1960, and Di Corpo has resided in that area all of his life. Both men have been active in local civic activities, but neither has any significant amount of broadcast experience. While Simon, who began the practice of law after his retirement from the FBI in 1964, will, as General Manager, oversee the operations of the station, a professional broadcaster, serving as the station manager, will be responsible for the daily activities at the station. Other professionals

[27] Although Fidelity asserts that other stockholders will spend varying amounts of time, ranging from five to twenty hours a week, on station activities, the *1965 Policy Statement* clearly holds that no credit will be given for the participation of any person who will not devote substantial amounts of time on a daily basis to the station. 1 FCC 2d at 395. Since Fidelity has made no showing that any of these other stockholders would participate on a daily basis, further consideration of their participation is not required.

will be hired to fill the day-to-day positions of program manager, sales manager, news director and chief engineer. Di Corpo's efforts as Director of Public Service Programming will be under the supervision of the professional program manager.

31. Although Fidelity has no record of previous operation to be considered in making a qualitative evaluation of its proposal, it has, in the prosecution of its application before this Commission, engaged in certain activities which may give some indication of its future behavior if it were to become a licensee. In this connection, on December 24, 1969, the Broadcast Bureau filed a petition questioning the preparation, signing, and filing by Fidelity of stock subscription agreements, amendments of its application, and affidavits. While the Bureau's petition was denied on April 22, 1970, the Commission stated, 22 FCC 2d 737, at 740:

> . . . that Fidelity was remiss in its representations to the Commission in failing to indicate that purported signatures were actually signed by agents, failing to secure ratification of so-signed documents without delay or withdrawing them, and otherwise failing to keep its house in order, . . .

thus clearly putting Fidelity on notice that its efforts to carry out its responsibilities as an applicant had been inadequate.

32. Nevertheless, on August 5, 1971, Fidelity filed a petition for leave to amend, reflecting significant changes in its corporate structure, without in any way suggesting that they had been in effect for at least 17 months. When challenged by RKO, see paragraph 9, above, Fidelity offered no excuse whatsoever for having filed its petition as if it were reporting contemporaneous events, simply asserting that the changes were not thought to be significant enough to require reporting, in spite of the fact that it had previously filed amendments reflecting similar changes.[28] Thereafter, on April 6, 1973, Fidelity filed another petition for leave to amend, this time reporting that one of its stockholders had acquired certain newspaper interests nearly one year earlier and claiming that it would not have any significance in the disposition of this proceeding, despite the paramount importance attributed to the diversification criterion under the *1965 Policy Statement* and despite its previous assertion of a preference based on the absence of any such connection.[29]

33. While a single failure to report a change in an application might not necessarily be of decisional significance, it is clear that every applicant has a continuing obligation to disclose to the Commission all pertinent facts and circumstances concerning the prosecution of its proposal. Thus, where there is a repeated failure to make timely and necessary reports of new developments affecting a proposal, a serious question arises as to whether the applicant comprehends the duties of a licensee and whether it can be expected to assume and discharge the responsibilities connected with the implementation of its proposal. Since it appears that Fidelity has on several occasions neglected to report such changes in a timely and open manner, and particularly since this practice continued even after its attention was directed to the need to keep its house in order, we believe that the record here gives little promise that Fidelity will effectively implement its paper integration promises and that this circumstance significantly reduces the weight which can be accorded to its quantitative integration proposal.

34. Turning to KHJ-TV, none of its management personnel has any significant ownership interest in the licensee. RKO has, however, within the supervisory policies and practices established for all of its stations, afforded considerable autonomy to the local staff in the operation of KHJ-TV. At the same time, RKO requires the management of its stations to involve themselves in a wide range of community and civic organizations and to use the information gained from such contacts to help determine the direction and programming of the station. During RKO's operation of KHJ-TV since 1951, station personnel living in the Los Angeles area have participated in community activities and acquired broad knowledge of local needs. In this way, the operation of KHJ-TV has combined the experience and stability of RKO's national organization with the independence and sensitivity to community needs of its local management to serve the entire area.[30]

35. While Fidelity enjoys an obvious quantitative advantage, it is important to note in evaluating the proposals in this comparative renewal proceeding that we are necessarily comparing an untested promise of future performance with a record of actual experience based on continuing contacts with the community, and, thus, Fidelity's proposal must be considered with care to determine whether any preference is realistically warranted. In this connection, the record shows that Fidelity will rely in many respects on a professional staff similar to that employed by RKO, that Fidelity's principals lack the broadcast experience which KHJ-TV's management has acquired in the operation of the station, and that RKO gives the station's staff autonomy to use their familiarity with the area's needs to develop appropriate programming. When these factors are considered in the light of Fidelity's demonstrated inability or unwillingness to carry out its responsibilities as an applicant, it is clear that Fidelity's quantitative advantage has been neutralized by the qualitative characteristics of its proposal and that, on balance, the differences in these two proposals are not so significant as to warrant a preference for either applicant under the integration criterion.

OTHER FACTORS

36. From our consideration of these proposals up to this point, we have established that each applicant is basically qualified to be a

[28] Although Fidelity's counsel subsequently attempted to assume responsibility for the delay in reporting the changes in Fidelity's proposal, there is no escaping the fact that Fidelity's earlier pleadings did not provide an open and candid explanation of the circumstances. In this respect, it should also be noted that one of Fidelity's stockholders, Louis J. Cella, Jr., testified during the hearing in a manner which, at the very least, must be described as evasive when questioned about the circumstances which resulted in the termination of his role as Vice President and Director of the applicant. See Transcript pages 1684-1695.

[29] Fidelity's inability or unwillingness to report developments in its proposal continues even to the present time. Thus, even though RKO, in a pleading filed September 8, 1971, pointed out significant changes in the percentages of stock held by each of Fidelity's stockholders, Fidelity has not made any attempt to submit the correct information in the form of an amendment to its application.

[30] In contrast to KHJ-TV's areawide service, it should be noted that Fidelity proposes to emphasize the needs and interests of a portion of the entire area in its programming, to the detriment of the public in the remaining areas. *Cf., Petersburg Television Corp.*, 19 FCC 451, at 474-476 (1954).

licensee, that the characteristics of the proposals differ in certain respects, but that none of those differences provides a basis for making a choice between the two applicants in this proceeding. Nonetheless, a selection must be made, and so we shall look to other aspects of the record affecting the public interest. In this connection, we believe that recognition must be given to the rights and expectancies of an ordinary renewal applicant. As stated by the Court in *Greater Boston Television Corporation* v. *F.C.C.*, 143 U.S. App. D.C. 383, at 400, 444 F. 2d 841, at 858, 20 RR 2d 2052, at 2073–2074 (1970), ". . . such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security."

37. Here, RKO's financial stability has provided an experienced and competent staff for KHJ-TV and afforded the station an opportunity to develop and strengthen its programming and community involvement in spite of financial losses. Since the station was acquired in 1951, RKO's investment of money and other resources has successfully made KHJ-TV a viable operation in a highly competitive market. Under these circumstances, and in keeping with the views expressed in *Greater Boston*, *supra*, we believe that there is a public interest, both in the Los Angeles area and the nation at large, in insuring the predictability and stability of broadcast service. If there is no such security for applicants seeking facilities with the intention of providing good service for the public, the overall development and motivation of the industry will suffer. While we recognize the need to avoid any burden upon an applicant for a new facility seeking to show that it will better serve the public interest, we are persuaded that credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service.[31] Since Fidelity has had a full opportunity to demonstrate that its proposal will better serve the public interest, and since the record is clear that Fidelity has not demonstrated that it will in fact provide a better service than RKO, we are convinced, for the reasons set forth above, that RKO's renewal application for KHJ-TV must be preferred.

38. However, the Commission's Memorandum Opinion and Order, 31 FCC 2d 70, released in this proceeding on August 2, 1971, stated that, in the event KHJ-TV is the preferable applicant on a comparative basis, final action would be held in abeyance pending the conclusion of the adjudicatory proceeding involving WNAC-TV Boston, Docket No. 18759, and that thereafter such action would be taken as appears to be necessary and appropriate in light of the evidence introduced in, and the outcome of, the Boston proceeding concerning the qualifications of RKO to be or to continue to be a licensee. Inasmuch as the questions

[31] The Commission has already indicated that the holding of *WHDH, Inc.*, which involved an existing operation conducted under various temporary authorizations and where a determination had been made that new applications would be accepted upon the expiration of the licensee's four month license, was restricted to the facts of that proceeding and that it does not apply to the situation of a conventional applicant for renewal of license. 17 FCC 2d 856, at 872–873 (1969). Nonetheless, since earlier language in the Commission's Decision in that proceeding, 16 FCC 2d 1 (1969), has been construed by some commentators to place an insuperable burden on a renewal applicant in a proceeding such as this one, we wish to take this opportunity to emphasize that such is not our intention and that the renewal applicant's ability to continue an existing service without disruption will be given weight in the future on a record like this one.

bearing on RKO's qualifications in the Boston proceeding have not yet been resolved, we shall, consistent with views expressed above, condition our present action in this case on the outcome of the Boston proceeding.

39. Accordingly, IT IS ORDERED:

(a) That the RKO General, Inc. petition to dismiss application of Fidelity Television, Inc., or, alternatively, to enlarge issues and reopen record for further hearing, filed August 16, 1971; the motion of RKO General, Inc. for leave to file response to supplement of Fidelity Television, Inc., filed on September 21, 1971; and the motion of RKO General, Inc. to supplement petition against Fidelity Television, Inc., filed April 25, 1973, ARE DISMISSED as moot.

(b) That the request for official notice filed by Fidelity Television, Inc. on November 16, 1971, and the request to file additional pleading filed by Fidelity Television, Inc. on December 6, 1971, ARE GRANTED.

(c) That the petitions for leave to amend filed by Fidelity Television, Inc. on July 18, 1972, and April 6, 1973; and by RKO General, Inc. on January 27, March 9, May 9, June 23, July 7, July 17, September 5, and December 14, 1972, and on February 8, March 15, April 19, May 1, May 10, June 29, July 30, September 4, September 21, and November 14, 1973, ARE GRANTED and the respective amendments ARE ACCEPTED.

(d) That the application of RKO General, Inc. for renewal of license for station KHJ-TV, Los Angeles, California, File No. BRCT-58, IS DEEMED TO BE GRANTED, and that the application of Fidelity Television, Inc. for a new television broadcast station at Norwalk, California, File No. BPCT-3655 IS DEEMED TO BE DENIED, subject to whatever action may be deemed appropriate following resolution of the matters in Docket No. 18759.

FEDERAL COMMUNICATIONS COMMISSION.

VINCENT J. MULLINS, *Secretary*.

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF RKO GENERAL, INC.

Exception No.	*Rulings*
1, 2, 4, 6–14, 16–31, 33–43, 59, 61–69, 71, 73, 75–80, 82, 85–89, 92, 93, 101–105, 107–112, 114, 115, 117, 120, 122, 124, 127–136, 140–151.	Denied. The Examiner's findings adequately and correctly reflect the record.

Exception No.	*Ruling*
3, 5	Granted to the extent that the record reflects RKO's media holdings as shown in its more recent amendments.
15	Denied for lack of decisional significance. See *RKO General Inc.* (*WNAC–TV*), 35 FCC 2d 100 (1972).
32	Granted to the extent that the words "by the same organization" are deleted, and *denied* in all other respects since the Examiner's findings correctly reflect the record.
44–58, 70, 72, 81, 84.	Denied. The Examiner's rulings contain no significant error.
60	Denied for lack of decisional significance. See footnote 27 of our Decision herein.
74	Granted to the extent reflected in footnote 30 of our Decision herein.
83	Granted to the extent reflected in footnote 28 of our Decision herein, and *denied* in all other respects for lack of decisional significance.
90, 91	Granted in substance. See paragraph 27 of our Decision herein.
94–96, 98, 100, 106, 113, 116, 118, 119, 121, 123, 125, 126, 137–139, 152, 153.	Denied. The Examiner's findings contain no significant error.
97	Granted in substance. See paragraph 14 of our Decision herein.
99	Granted in substance. See paragraph 17 of our Decision herein.
154, 156, 158, 166, 168, 175, 178.	Granted to the extent reflected in our Decision herein.
155	Denied. Matters pertaining to proposed programming are not considered in the absence of a special issue. See *1965 Policy Statement*, 1 FCC 2d at 397–398.
157	Denied for lack of decisional significance.
159	Granted to the extent reflected in our Decision herein and otherwise *denied* for the reasons set forth in paragraphs 24–26 of our Decision herein.
160–165, 167, 169, 171–174, 176, 180, 181, 170, 179	Granted to the extent that our conclusions have been substituted for those of the Examiner.
177	Granted to the extent reflected in footnote 28 of our Decision herein, and otherwise *denied* for lack of decisional significance.
182	Granted to the extent reflected in footnote 30 of our Decision herein.
	Granted.

EXCEPTIONS OF FIDELITY TELEVISION, INC.

Exception No. (Findings)

1	Granted to the extent that the record reflects RKO's media holdings as shown in its more recent amendments.
2–11, 13–15, 17–20, 22–52.	Denied. The Examiner's findings adequately and correctly reflect the record.
12	Granted to the extent reflected in footnote 23 of our Decision herein, but otherwise *denied* since the Examiner's findings adequately and correctly reflect the record.
16, 21	Denied for lack of decisional significance. See *RKO General, Inc.* (*WNAC–TV*), 35 FCC 2d 100 (1972).

Exception No. (Conclusions)

Exception No.	*Ruling*
1, 2, 10, 11, 13, 14	Granted to the extent that our conclusions have been substituted for those of the Examiner.
3, 4	Granted to the extent that our conclusions have been substituted for those of the Examiner, but *denied* in all other respects since the record supports the findings in question.
5, 7, 8	Denied for the reasons stated in our Decision herein.
6	Denied for lack of decisional significance.
9	Granted to the extent reflected in our Decision herein.
12	Granted to the extent that our conclusions have been substituted for those of the Examiner, but denied in all other respects for the reasons stated in our Decision herein.

Exception No. (Rulings)

1–30	Denied. The Examiner's rulings contain no significant error.

Exception No. (Other Matters)

1–10	Denied. The Orders contain no significant error.
Final unnumbered exception.	Denied for the reasons set forth in our Decision herein.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today's decision, granting RKO's renewal application for KHJ–TV in Los Angeles, may very well be the worst decision of this Commission during my term of seven years and five months.

(1) This proceeding began in 1965 when, on August 31, RKO filed an application for renewal for its station KHJ–TV in Los Angeles. Two months later, on October 25, Fidelity Television, Inc.—a newly-formed group—filed for a new television station on the same channel as KHJ–TV—Channel 9. Accordingly—after the Commission found both applicants fully qualified—the two applications were found to be mutually exclusive and a hearing was ordered.

Four years later Hearing Examiner Donahue issued his initial decision recommending that the license be granted to Fidelity, and that RKO's application for renewal be denied.

For reasons that have never been fully explained, the Commission majority waited for over two years before holding oral argument in this case on October 12, 1971.

It then waited an additional two years before rendering a decision in the case.

This delay has required the successful applicant, Fidelity, to go to the U.S. Court of Appeals for a writ of mandamus on not one, but two occasions. Today's decision is rendered only in the face of the threat of such a writ of mandamus.

(2) RKO has engaged in some of the most classic anticompetitive behavior imaginable in the use of its station. For example, the Pepsi-Cola Company was told that Pepsi-Cola would not be sold in the RKO General Tire plants unless Pepsi-Cola would advertise on KHJ–TV. Subsequently, Pepsi's advertising budget on KHJ–TV was increased, and the soft drink dispensers were installed. The record is replete with examples of this kind. It was the position of the Department of Justice

in its *amicus* brief filed with this Commission that if these findings of the Hearing Examiner are correct, RKO should be absolutely disqualified from continuing as a licensee of this Commission.

The Examiner did not take such a stern view of the matter. He did, however, find RKO to suffer a significant demerit as a result of its abuse of its monopoly power.

The Commission majority today finds RKO neither disqualified nor suffering a demerit for this behavior.

(3) The past programming of KHJ-TV was qualitatively somewhat less than mediocre. Fidelity made no effort to disguise the fact that it had deliberately sought to challenge the absolutely worst station in the Los Angeles area. It wished to be a successful challenger. There is nothing in the record of this case to suggest that it made an erroneous choice or that it should not be successful. The Hearing Examiner's description of the programming is as persuasive as it is colorful on this score.

In the *Moline*[1] case, this Commission found that the incumbent would be renewed even though it had not met its promised levels of programming, because the programming that it did in fact provide was not the most wretched imaginable. Now, in this case, confronted with such programming, the Commission finds it acceptable on the grounds that the incumbent never promised to do any more.

One is left with no other possible conclusion than that no programming—regardless of how bad it is or what was in fact promised—will ever be found to constitute a demerit against an incumbent licensee.

(4) There is simply no way that the record in this case can be read without concluding that Fidelity is the superior applicant under not just some, but all of the comparative criteria this Commission has conventionally used.

As for diversity of ownership, Fidelity is a new applicant which owns no other media in the area. (A 1% shareholder does have some interest in some suburban newspapers.) RKO, by contrast, owns an AM and an FM radio station in the market, as well as the television station, as well as numerous other broadcast properties in other markets throughout the United States. Clearly Fidelity is the superior applicant with regard to this comparative criterion.

As for local ownership, all of Fidelity's owners live in the Los Angeles area. None of RKO's owners lives in the Los Angeles area. Thus, once again, Fidelity must be found the superior applicant as to this comparative criterion.

The Commission has often emphasized the desirability of an integration of ownership and management—that is, that those who own the broadcasting facility actually participate in the management of it. Of Fidelity's ownership, a full 23% represents owners who will be involved full time in the operation of the station. None of the owners of RKO is involved in any way in the operation of KHJ-TV. Once again, Fidelity must be found the superior applicant.

Anticompetitive behavior was used by the Hearing Examiner as a comparative criterion, rather than disqualifying—as the Department

[1] *Moline Television Corp.*, 31 FCC 2d 263 (1971).

of Justice urged. I believe, with the Department of Justice, that KHJ-TV should be disqualified under the set of facts before us. But treating it as a comparative criterion, once again, Fidelity is found to be the superior applicant.

The Examiner also awarded comparative demerits to KHJ-TV for its excessive commercialization and its failure to editorialize. Although there would be circumstances under which I might find a failure to editorialize fully explicable, I do not believe those circumstances exist here. And I agree with the Hearing Examiner as to excessive commercialization. Thus, once again, Fidelity must be found to be the superior applicant.

Only as to past broadcast experience can RKO be said to have any advantage whatsoever and, given the nature of its performance, it is not clear how that can count much in its favor.

(5) Finally, I believe that Fidelity was deprived of the opportunity to which it is entitled in law to show what its proposed programming would be. See *Chapman Radio & Television Co.*, 5 F.C.C. 2d 416 (1966).

The majority cites no precedents for its holding in this case simply because there is none.

I may issue a more detailed discussion of this case at some future date, but this discussion is enough to highlight my despair over the Commission's abuse of statutes, past Court of Appeals decisions, and its own precedents in its strained effort to protect RKO's investment in KHJ-TV.

I dissent.

Dissenting Statement of Commissioner H. Rex Lee

I must dissent to the majority's decision to grant the application of RKO General, Inc. for renewal of license for Station KHJ-TV, Los Angeles, California, and to deny the competing application of Fidelity Television, Inc. for a new television station at Norwalk, California. The decision effectively ignores the impact of record evidence compiled with regard to reciprocal trade practices of General Tire and Rubber Company and its subsidiaries, including RKO, on the latter's qualifications to remain licensee of KHJ-TV, carefully avoids any attempt to consider the effect of serious issues specified against RKO in a comparative proceeding involving its Boston television station, WNAC-TV,[1] incorrectly assesses KHJ-TV's past broadcast

[1] On December 3, 1969, the Commission designated the renewal application for WNAC-TV for hearing with two competing applications. See 20 FCC 2d 846 (1969). The hearing issues included a determination of whether RKO should be disqualified as a broadcast licensee or issued a comparative demerit in view of alleged anticompetitive trade practices directly related to the operation of WNAC-TV and, therefore, was much broader than the issue tried in the KHJ-TV case. Subsequently, the Review Board enlarged the issues in the Boston proceeding to determine whether, in sworn testimony given during the course of the KHJ-TV proceeding, officers, employees and/or former employees of RKO or General Tire had misrepresented or concealed facts or had been lacking in candor in regard to the existence, nature and extent of reciprocal trade practices. Upon petition by the Broadcast Bureau, the Commission declined to reopen the KHJ-TV hearing record for the purpose of specifying issues similar to those in the Boston proceeding. However, it stated that, in the event RKO was found to be the preferred applicant on a comparative basis in the Los Angeles proceeding, the issuance of a final decision would be deferred until conclusion of the Boston case.

record and distorts the relevance of traditional comparative criteria in an attempt to favor an existing licensee.

Contrary to the majority's position, I believe that evidence of reciprocal trade practices by General Tire and RKO reflects adversely on RKO's licensee qualifications. The hearing record in this proceeding provides ample support for the proposition that General Tire and its subsidiaries engaged in substantial efforts to use corporate purchasing power to improve the profitability of KHJ–TV through the mechanism of reciprocal trade agreements, without regard to the quality of the station's programming. The record illustrates numerous instances where General Tire utilized reciprocal trade agreements to obtain advertising business for its radio and television stations, including KHJ–TV. In fact, the evidence shows that General Tire attempted to bring pressure on advertisers to buy time over RKO stations, often for reasons completely unconnected with the quality of programming being produced by the stations. For instance, as the result of extensive negotiations in 1962, General Tire and Pepsi-Cola concluded a "mutually beneficial association" whereby more Pepsi-Cola would be placed in General Tire plants in return for increased Pepsi-Cola radio and television advertising. As a result, Pepsi-Cola's advertising on KHJ–TV went from $3,500 in 1964 to $40,000 in 1965. Similarly, negotiations with Olin-Mathieson, which concerned the award of a fixed percentage of General Tire's needs for polyol for the synthetic rubber process, resulted in Olin-Mathieson advertising on KHJ-TV jumping from nothing in 1962 and 1963 to $12,350 in 1964.

Correspondence and other evidence of the relationship between Aluminum Company of America (Alcoa) and General Tire also indicated that the former's advertising on KHJ–TV resulted from the mutually-beneficial trade arrangement rather than from any particular desire to advertise on the station. Although Alcoa placed no advertising on KHJ–TV during 1962, 1963 or 1964, it spent $8,069 with the station in 1965. In a 1962 Trade Relations and Customer Activity Report of General Tire, it was noted that American Airlines' advertising agencies would drop RKO in 1963 and that, therefore, the company, where feasible, should refrain from using the airline. Although no money was spent on KHJ–TV advertising by American Airlines in 1962 or 1963, the airline did spend $14,500 and $9,650 in 1964 and 1965, respectively. Similar trade relations efforts with the Hertz Corporation resulted in that company's making the following expenditures on KHJ–TV: 1962–$63,550; 1963–$90,025; 1964–$20,400; 1965–$9,350.

These reciprocal trade practices obviously placed KHJ–TV's competitors at a disadvantage for reasons often unconnected with the quality of the station's programming or the size of the audience involved. Moreover, the existence of the corporate parent's economic pressure effectively destroyed any incentive for KHJ–TV to provide improved programming since the station had advertiser support available in any event. As the Department of Justice noted in its *amicus curiae* brief, filed in this proceeding on June 10, 1970, General Tire and RKO practiced overt reciprocity involving explicit agreements, which is destructive of competition and is inconsistent with the public

interest since, to the extent that a broadcast licensee can rely on reciprocal purchasing power to obtain advertising; it may cease to provide the quality of service which would have been necessary in a competitive atmosphere. In effect, Justice would find that reciprocal trading practices are *per se* violations of the antitrust laws and are anticompetitive in nature. Nevertheless, the majority stresses the fact that the civil antitrust action brought against General Tire and three of its subsidiaries, including RKO, on the basis of reciprocal trade practices was eventually terminated with the issuance of a consent decree and that, therefore, no determination was made that improprieties had occurred or that such practices, standing alone, violate the antitrust laws. The majority also points out that the "relevant legal and economic concepts were in a state of flux at the time" and that "many other corporations engaged in similar trade relations practices during this period."

In spite of the majority's attempt to minimize the impact of the conduct at issue here, the fact remains that General Tire and RKO engaged in reciprocal trading of a coercive nature which was intended to benefit the latter's radio and television stations and which did result in increased advertising revenues for KHJ–TV. Without addressing the question of whether the trade practices violated the antitrust laws, it is clear that RKO acted in derogation of the public interest by participating in anticompetitive conduct and that this Commission has the responsibility to prevent monopolistic domination in the broadcast field. See *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Moreover, the Justice Department's willingness to settle for injunctive relief of a prospective nature in its antitrust action against General Tire and its subsidiaries does not diminish the significance of the past trade practices found in the record of this proceeding—practices which were directly related to the operation of broadcast facilities. As a result, I must conclude that such conduct effectively precludes a finding that RKO possesses the requisite qualifications to remain the licensee of KHJ–TV.

Fidelity has claimed that the limited scope of the anticompetitive practices issue in this proceeding and the alleged lack of candor by RKO principals during the evidentiary hearing hampered its efforts to adduce evidence about General Tire's reciprocal trading activities. As noted previously, the Review Board added issues in the Boston proceeding concerning the candor of RKO and General Tire witnesses who had testified in the Los Angeles hearing with regard to the existence, nature and extent of reciprocal trade practices. While the Commission declined to reopen the record in this proceeding for the purpose of specifying the anticompetitive practices and candor issues already included in the Boston case, it did order that a final decision herein would be held in abeyance pending conclusion of the Boston case if RKO was held to be the preferred applicant on a comparative basis. However, on June 11, 1973, the United States Court of Appeals for the District of Columbia, in response to a petition for writ of mandamus filed by Fidelity, stated that a decision in this proceeding appeared to have been unreasonably delayed, and it asked for a report of the Commission's action within 30 days. On July 6, 1973, the Commission informed the Court that a decision herein would be prepared as

expeditiously as possible. Subsequently, Fidelity renewed its request for a writ of mandamus.

As the majority notes in its decision, it would be preferable to await the outcome of the Boston proceeding before acting on KHJ-TV's renewal application so that all questions about RKO's qualifications to be a broadcast licensee could be resolved at one time. Such a procedure is especially appropriate since the Boston case involves a broader issue on reciprocal dealing and an issue concerning the candor of RKO and General Tire witnesses in testimony during the evidentiary phase of this proceeding. It is more than obvious that these issues could have a profound impact on the final disposition of this case since if RKO is found to be disqualified as a broadcast licensee under either or both of these issues, it would not be entitled to a comparison with Fidelity. Of course, the majority attempts to avoid this procedural predicament by conditioning its grant of RKO's renewal application and its denial of Fidelity's competing application on whatever action is deemed appropriate following resolution of the Boston proceeding. However, such a course of action does not represent a *final* decision herein, which was promised by the Commission in its report to the Court of Appeals. I would have preferred to expedite the resolution of the qualifications issues in the Boston proceeding before attempting a comparison of the RKO and Fidelity proposals.

Even if I assumed that RKO possessed the basic qualifications to remain licensee of KHJ-TV, I could not agree with the majority's analysis of the station's past broadcast record and its comparative evaluation of the RKO and Fidelity proposals. Initially, it should be noted that the majority has decided to follow the approach taken in *Moline Television Corp.*, 31 FCC 2d 263 (1971), by assessing all relevant comparative criteria, including the past broadcast record of the renewal applicant. Of course, in relying on the traditional comparative criteria as articulated in the 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, the majority's decision squarely conflicts with the Commission's holding in *A. H. Belo Corp.*, 40 FCC 2d 1131 (1973), appeal pending, U.S. App. D.C. No. 73-1673. In *Belo*, the Commission stated that whether a renewal applicant's past broadcast record warrants a "plus of major significance" is of crucial importance in the judgmental process and that there is no need to rely on presumptions concerning integration of ownership and management, local residence, etc. in determining how the applicant will respond to community needs and interests.

The approach in *Belo* is based on the Court of Appeals' opinion in *Citizens Communications Center* v. *F.C.C.*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971), which held that licensees should be judged primarily on their past performance, that insubstantial past performance should preclude renewal of license, but that superior performance (as measured by such factors as the elimination of excessive and loud advertising, the delivery of quality programming and the reinvestment of profits for the benefit of station audience) should result in a plus of major significance in renewal-new applicant proceedings.[2] The Court also stressed that the Commission should strive to clarify in both quantitative and qualitative terms what constitutes superior service. In its general inquiry in Docket No. 19154, the Commission singled out the areas of local programming and news and public affairs programming as indicative of substantial service and although it stated that the proposed standards would not be applied to any pending renewal proceeding, the Commission suggested that independent television stations in the top 50 markets with revenues over $5,000,000 should provide about 15% local programming, including 15% in prime time; about 5% news programming, including 5% in prime time; and about 5% public affairs programming, including 3% in prime time.[3]

Using any test of past performance, I can only conclude that KHJ-TV's broadcast record must be weighed against it in the comparative evaluation of the applicant's proposals. While I recognize, as does the majority, that KHJ-TV has presented a number of outstanding entertainment specials and has received several awards and favorable public comment, the record clearly shows that the station placed greatest emphasis on the presentation of motion pictures and broadcast very little regularly-scheduled local live or public service programming during prime time; used news programming to fill in spots between feature movie presentations; and showed little responsiveness to the serious criticism of its viewing audience. Analysis of composite week data indicates that the station carried 86.5% entertainment programming; 3.375% news; 3.75% education; 3% talks; 3.375% religious, agricultural and discussion; and 7.13% live programming. In comparison with the three other independent VHF stations in the market, KHJ-TV had the highest percentage of entertainment programming, the lowest percentages in the news and discussion categories and the lowest percentages of live programming for both the total day and prime time.[4] Therefore, very serious questions are raised concerning the licensee's broadcast record in view of the limited news and public affairs programming on KHJ-TV, the station's failure to editorialize during the period in question, its stress on heavily-commercialized movie features and its unwillingness to respond to public complaints, especially those relating to movie exhibition. To the extent that the hearing record shows numerous deficiencies in KHJ-TV's broadcast record, it is not entitled to a plus of major significance as was awarded to the renewal applicant in *Moline*. In fact, it could be argued that KHJ-TV's "insubstantial past performance" precludes license renewal. In any event, the station's record must be considered as a minus factor in the comparative evaluation rather than as one within the bounds of average performance as the majority concludes.

In regard to the other comparative factors discussed by the majority, I believe that Fidelity is entitled to preferences for diversification of the media of mass communications, integration of ownership with management and local ownership. Under the diversification factor, I

[2] The Court's opinion precluded the use of the Commission's 1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424.

[3] See Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580, adopted February 17, 1971. On August 4, 1971, the Commission adopted a Further Notice of Inquiry (31 FCC 2d 443) in light of the *Citizens Communications Center* decision and indicated that the Court's decision reinforces the need to resolve the matters at issue in Docket No. 19154.

[4] In *Moline*, the Commission accorded a network-affiliated, renewal applicant a plus of major significance for a past broadcast record that included 14.9% local live programming, including 11.7% in prime time; 4.3% news; the absence of program complaints; and a favorable showing in comparison with market competitors in local live programming. KHJ-TV's past broadcast record suffers by comparison.

note that while RKO owns and operates AM–FM stations in Los Angeles and other stations in other cities across the country (and numerous cable systems and media-related enterprises), neither Fidelity nor its stockholders have any interest in an existing broadcast facility—although one stockholder has a 10% interest in a cable system and another stockholder has a 26% interest in a corporation publishing newspapers in several Los Angeles area suburbs. The majority concludes that even though RKO clearly has more media interests than Fidelity, the nature of the interests has no adverse effect on the flow of information to the audience to be served, especially since there is a plethora of media outlets already in existence in the area. However, such a position effectively undercuts the diversification criterion and while I am sympathetic to the majority's point that any attempt to restructure ownership patterns in the broadcast industry should be accomplished through the rule making process rather than on an *ad hoc* basis, the fact remains that the Commission's 1970 Renewal Policy Statement was rejected by the Court of Appeals; that the inquiry in Docket No. 19154 has not been concluded; and that the majority professes to evaluate the applicants on the basis of traditional comparative criteria, one of which has been diversification.

In similar fashion, Fidelity should be awarded a preference for the integration factor since it proposes substantial integration of ownership with management in the operation of the Norwalk facility while RKO has had and will have none. Two persons, both local residents and active in civic affairs, with over 22% of Fidelity's stock would occupy full-time positions with the proposed station as general manager and director of public service programming while none of RKO's management personnel has any significant ownership interest in the licensee. While the majority concedes the quantitative superiority of Fidelity's integration proposal, it downgrades the qualitative aspect of the proposal since Fidelity principals lack broadcast experience and since the applicant's behavior before the Commission has raised questions about its ability to implement an integration proposal.[5] However, the mere absence of broadcast experience is insufficient to raise doubts about the *bona fides* of the integration proposal and, as pointed out in the 1965 Policy Statement on Comparative Broadcast Hearings, an emphasis on such experience could effectively discourage the entry of qualified newcomers into broadcasting. See 1 FCC 2d at 396 (1965). In addition, the Broadcast Bureau's earlier request to reopen the record and to add issues dealing with the preparation, signing and filing of stock subscription agreements, application amendments and affidavits by Fidelity was denied by the Commission, and the majority now dismisses RKO's request for Section 1.65 issues even though it professes to be disturbed by the questions raised and indicates that ordinarily a remand for further hearing would be necessary. The majority cannot have it both ways. It cannot reject or dismiss requests

[5] On December 24, 1969, the Broadcast Bureau filed a petition to reopen the hearing record and to enlarge the issues in this proceeding, based on questions concerning the filing by Fidelity of stock subscription agreements, amendments of its application and affidavits which indicated the participation of Kenneth E. BeLieu in the applicant. On August 16, 1971, RKO filed a petition to dismiss Fidelity's application or, alternatively, to enlarge the issues and to reopen the hearing record. RKO asserted that an amendment to Fidelity's application reflects a fundamental change in corporate structure which was not timely reported to the Commission as required by Section 1.65 of the Rules.

for hearing issues and then use the questions raised by the requests against the applicant in the comparative evaluation. Such an approach seriously prejudices the rights of an applicant, but it is apparently employed here to diminish the effect of Fidelity's superior integration proposal and to undercut the integration factor in renewal-new applicant proceedings.

The majority then attempts to isolate "other factors," which tip the comparative scales in favor of RKO, after finding that both applicants are basically qualified, but that none of the differences in the proposals are decisional. These "other factors" consist primarily of a recitation of the investment made by RKO in KHJ–TV and of the need for insuring predictability and stability in the broadcast service. Of course, such "factors" are present in every renewal-new applicant proceeding, and I question whether they assume any independent relevance outside of the context of past broadcast record. While I am most sympathetic with the majority's desire to articulate some meaningful standards to govern the comparison between renewal and competing applicants, I cannot agree that an *ad hoc* approach is desirable. I so stated in my concurring statement in *A. H. Belo*, and I continue to adhere to that position. So that while I may concur with the general statement of policy that a licensee's actual past performance is of crucial importance in a comparative proceeding and with the need to clarify the scope of the comparative issue in a renewal-new applicant proceeding, I cannot agree that an isolated decision or designation Order is the proper vehicle for the delineation of major policy by the Commission. The general inquiry raised in Docket No. 19154 is whether we can formulate some definitive guidelines for application in a comparative proceeding involving a regular renewal applicant, and it seems obvious that any major policy pronouncements in this important area of broadcast regulation should be contained in a report and order in Docket No. 19154.

In summary, I have dissented to the majority's decision here because I believe that the anticompetitive practices engaged in by General Tire and RKO, which inured to the benefit of KHJ–TV, reflect so adversely on the licensee's qualifications that the renewal application should be denied. Moreover, the issues specified in the Boston proceeding concerning trade practices and the candor of General Tire and RKO witnesses in the Los Angeles hearing should be resolved prior to the disposition of this case (in spite of the Court of Appeals' apparent willingness to entertain a writ of mandamus) so that the Commission can determine whether RKO is entitled to a comparative evaluation with Fidelity. Even if I assume that RKO is basically qualified to remain a licensee, it must fail in a comparison with the challenger, whose preferences include diversification, integration and local ownership, since RKO must be assessed major comparative demerits for its past broadcast record and for its reciprocal trade practices.[6] Therefore, I dissent.

[6] The majority decision does not even mention reciprocal trade practices in the comparative evaluation of the applicants even though the Trial Judge below found that RKO's participation in General Tire's reciprocal dealing subverted the public interest and justified a major discredit.

SUPREME COURT, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-166

FIDELITY TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

APPENDIX D

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APPENDIX D

Initial Decision of
Hearing Examiner Thomas H. Donahue

August 13, 1969

FCC 69D-43
36216

In re Applications of	)	
	)	
RKO GENERAL, INC. (KHJ-TV) Los Angeles, California	)	Docket No. 16679 File No. BRCT-58
	)	
For Renewal of Broadcast License	)	
	)	
FIDELITY TELEVISION, INC. Norwalk, California	)	Docket No. 16680 File No. BPCT-3655
	)	
For Construction Permit for New Television Broadcast Station	)	

Issued: August 11, 1969
Released: August 13, 1969

[¶ 53:24(R)] *Programming considerations.*

In a comparative consideration of the application for renewal of an independent TV station in Los Angeles, the failure of the station to compete with the network stations in news programming, the failure to editorialize, the heavy emphasis on commercial announcements and movies, some featuring crime and violence, provoking objections from a viewers group and a church group, among

others, are adverse factors. RKO General, Inc., 16 R R 2d 1181 [Init. Dec., 1969].

[¶53:24(Z)(10)] *Trade practices.*

In a comparative consideration of the application for renewal of an independent TV station in Los Angeles operated by a subsidiary of a larger conglomerate, the practice of the parent company in using its purchasing power to induce its larger sellers to buy advertising time and announcements on the subsidiary's stations is an adverse factor. RKO General, Inc., 16 RR 2d 1181 [Init Dec., 1969].

[¶53:24, ¶53:24(A), ¶53:24(R), ¶53:24(U), ¶53:24(Z)(10)] *Choice between TV renewal applicant and applicant for new station.*

In a comparative consideration of the renewal application of an independent TV station in Los Angeles operated by a subsidiary of a large conglomerate owning, among other things, several radio and television stations, and a mutually exclusive application for a new station in Norwalk, California, the latter is preferred because of its local ownership, its lack of interests in other mass media, and the demonstrated need of a station in the locality. Moreover, the licensee of the existing station, notwithstanding its experience in, and the many contributions it has made to television, was unfavorably affected by its heavy emphasis on movies in its programming and by the use of the

purchasing power of its parent company to attract advertisers. RKO General, Inc., 16 RR 2d 1181 [Init Dec., 1969].

APPEARANCES

Harold David Cohen, William S. Green, and J. Laurent Scharff, on behalf of RKO General, Inc.; Edward P. Morgan, Robert N. Green, and Walter H. Sweeney, on behalf of Fidelity Television, Inc.; Anthony J. Sobczak and John F. Reilly, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission (limited participation only).

INITIAL DECISION OF HEARING EXAMINER THOMAS H. DONAHUE

Preliminary Statement

1. On August 31, 1965, RKO filed an application for renewal of license covering its station KHJ - TV on Channel 9 in Los Angeles. On October 25, 1965, Fidelity filed an application for a construction permit for a new television station to operate on Channel 9 in Norwalk, California.

2. On June 8, 1966, the Commission issued an order (FCC 66-503) finding both the RKO and Fidelity applications qualified for grant and also finding them mutually exclusive. Hearing was directed on these issues:

1. To determine which of the proposals would better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order carried the following footnote to the designation clause:

> "2 The Commission in its Policy Statement on Comparative Broadcast Hearing, (FCC 65-689, released July 28, 1965, 30 FR 9660, 5 RR 2d 1901), indicated that it did not therein attempt to deal with'. . . the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license. ' That remains our position. However, we have also, subsequently indicated (Seven (7) League Productions, Inc., et al., 1 FCC 2d 1597-9) that the Policy Statement will govern the introduction of evidence where a renewal application is being contested. For example, as in regular comparative hearings, evidence relating to programming proposals and to character will not be entertained in the contested renewal proceeding unless first specifically put in issue by the Hearing Order or on subsequent enlargement of issues upon a threshold factual showing that a distinctive difference or deficiency exists and is worth exploring. We have not, however, reached any determinations as to weight to be accorded various factors of difference betweem the renewal applicant and competin applicant, preferring instead to do so later up on the full, factual hearing record that is developed by competent evidence under the designated issues. According[ly], parties in a contested renewal proceeding are free to urge any arguments they may deem applicable concerning the relative weight to be afforded the evidence bearing on the various comparative factors developed at hearing."

3. On June 27, 1966, Fidelity filed a Petition to Enlarge Issues. The issues sought read:

> (a) To determine whether a grant to one or the other of the applicants would provide the more fair, and equitable distribution of television service.
>
> (b) To determine the "service philosophy" of each applicant and the matters on which the applicants rely in support thereof.
>
> (c) To determine the significant differences between the applicants with respect to the programming service proposed in each application.

On the same date RKO filed a Petition to Clarify the Issues or, in the Alternative, Enlarge the Issues. This pleading requested that the issues be clarified to embrace the record of RKO, in the alternative, the issues be enlarged to permit the introduction of evidence concerning PKO's record of performance.

4. On July 11, 1966, a prehearing conference was held. The conference was largely deovted to a discussion of un- under what issues the hearing was to be tried and how, under the Commission's processes, answer to that question could or should be obtained. The Broadcast Bureau announced that since the hearing was to be a comparative hearing it would not participate.

5. On July 29, 1966, another prehearing conference was held. At that conference the Examiner ruled that, in accordance with the Commission's Policy Statement, he would hear threshold presentations on whether RKO should be permitted to make a showing, at hearing, on KHJ-TV's

past record of performance, particularly in respect to past record of programming.

6. On September 26, 1966, the Review Board released a Memorandum Opinion and Order (FCC 66R-368) [8RR 2d 576]denying RKO's petition of June 27, 1966, to enlarge or clarify the issues. On October 31, 1966, the Board released a Memorandum Opinion and Order (FCC 66R-430) [8 RR 2d 957]denying Fidelity's petition of June 27, 1966, to enlarge issues.

7. On September 30, 1966, the Examiner heard the threshold showing noted above. Following these presentations he ruled that the past broadcast record of KHJ - TV and, to a limited extent, the record of RKO were to be considered within the scope of the issues.

8. On November 7, 1966, Fidelity filed with the Commission a pleading called "Application for Review Board Order Denying Requested Issues." This pleading sought reversal of the Board's denials of Fidelity's June 27, 1966 petition. By order released December 29, 1966 (FCC 66-1171), the pleading was denied.

9. Hearing got underway on February 27, 1967. Between February 27, 1967 and June 15, 1967, 24 days were spent in hearing. The record closed on the latter date.

10. During hearing, on March 8, 1967, FIdelity filed a Petition for Enlargement of Issues and for Other Relief. These issues were sought:

> To determine, in light of all the facts and circumstances surrounding the Complaint filed by the United States of America on March 2, 1967, against General Tire and Rubber Company, Aerojet-General Corporation, A.M. Byers Company, and

> RKO General, Inc., whether RKO General, Inc., is qualified to be a licensee of the facility for which it is applying herein, or alternatively, whether such matters bear upon the comparative qualifications of RKO General, Inc.
>
> To determine the extent of involvement by RKO General, Inc., and related corporations in the communications and entertaiment fields, including, but not limited to such things as the production and distribution of films and other program material, and ownership and operation of broadcast stations, CATV systems, and theaters; whether there exists a concentration of control and ownership of production, distribution, and exhibition facilities that discourages free competition or is otherwise inconsistent with the public interest; and whether any matters so adduced reflect adversely on RKO General, Inc., to the point of requiring its disqualification herein or the assessment of a comparative demerit.

By Memorandum Opinion and Order, released June 20, 1967 (FCC 67R - 239) [10RR 2d 282]the Review Board denied this petition. The Board further ordered that if grant were to be made to RKO it should be made without prejudice to whatever action, if any, the Commission might deem appropriate as a result of a pending civil action, filed March 2, 1967, in Federal Court, United States v. General Tire, et al., (No. 6-67-155), US DC. No. Dist. Ohio.

11. On March 9, 1967, Fidelity filed a Petition for Special Relief with Respect to Application for Review. Through this pleading Fidelity sought designation of these issues:

(a) To determine on a comparative basis the significant differences between the applicants with respect to the programming that they propose to provide to the community and area each would serve.

(b) To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain the needs and interests of the community and area each proposes to serve.

As an alternative to the Commission's adding the requested issues, request was made that the Review Board be directed to make a determination whether such issues should be added. The Commission by Memorandum Opinion and Order released July 12, 1967 (FCC 67-694) [10 RR 2d 617], denied the petition.

12. On June 30, 1967, FIdelity filed with the Review Board a Petition for Clarification. The pleading requested the Board to claryfy its Memorandum Opinion and Order of June 20, 1967, so as to remove any doubt that Fidelity, under the issues, "be permitted to adduce all relevant material evidence susceptible of development within the ambit of the Commission's Rules bearing upon the charges contained in the anti-trust complaint, particularly as they relate to RKO's broadcast practices." The petition was denied by a Review Board Memorandum Opinion and Order released August 28, 1967 (FCC 67R-359) [11RR 2d 105].

13. On July 24, 1967, Fidelity filed a Petition for Clarification or in the Alternative for Enlargement of Issues. That pleading sought these issues:

(a) To determine on a comparative basis the significant differences between the applicants with respect to the programming proposed by each applicant.

(b) To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain community needs and interests.

By Memorandum Opinion and Order released September 22, 1967 (FCC 67R-400) [11 RR 2d 217], the Review Board denied the petition.

14. On February 9, 1968, Fidelity filed a Petition to Reopen the Record. The pleading sought opportunity to present newly discovered evidence relating to reciprocal trade practices of RKO.

15 On February 19, 1968, Fidelity filed a Petition for Reconsideration and for Enlargement of Issues. This pleading asked the Review Board to reconsider its order of June 20, 1967.

16. By Memorandum Opinion and Order released March 11, 1968 (FCC 68M-394), the Examiner ordered that the record be reopened and that a conference be held looking toward further hearing. In the order reopening the record the following statement was included concerning the scope of future proceedings:

"The record is not being reopened for review of the trade practices of General Tire and Rubber and its subsidiaries. It is not being reopened as

> a repository for the record in the Ohio anti-trust suit. The Examiner is not inviting a do -it -yourself kit of undigested data sealed with a promise that some of it may be material to the qualifications of RKO. Petitioner asks that the record be reopened for the purpose of taking evidence on the reciprocal trade practices of RKO. With the caveat that such evidence must be patently germane to RKO's stewardship of KHJ - TV that language is adopted as words limiting the scope of future hearing."

17. Further prehearing conferences were held on March 18, April 10 and April 15, 1968. A hearing conference was held on August 15, 1968. Hearings under the reopened record were held for 12 days between June 12, 1968 and August 26, 1968. The record closed on the latter day.

18. On May 10, 1068, the Review Board released a Memorandum Opinion and Order denying the Petition for Reconsideration and for Enlargement of Issues filed by Fidelity on February 19, 1968 (FCC 68R - 196) [13 RR 2d 85].

19. On May 17, 1968, Fidelity filed an Application for Review. This pleading asked the Commission to reverse the Review Board and grant the relief requested in its Petition for Reconsideration and for Enlargement of Issues.

20. On September 9, 1968, the Commission by Memorandum Opinion and Order ruled on Fidelity's Application for Review of May 17, 1968 (FCC 68R-892) [14 RR 2d 90]. The Commission ruled that the development of events had given Fidelity substantially what if sought by

its petition except for a disqualification issue. On its own motion the Commission added this issue:

> To determine, in light of the evidence adduced with respect to the preceding issues, whether RKO General, Inc. should be disqualified or, if not, whether a comparative demerit should be assessed against it in this proceeding.

21. Proposed findings of fact and conclusions were filed on the first two issues by RKO and Fidelity on September 15, 1968. Reply findings were filed by both applicants on October 20, 1968. Supplemental proposed findings and conclusions on the trade segment of the hearing were filed by Fidelity on October 28, 1968 and by RKO on December 9, 1968. On January 31, 1969, Fidelity filed a motion to strike and reply to the supplemental findings and conclusions of RKO. On the same date the Broadcast Bureau, who as previously noted, did not participate in the proceeding, filed proposed findings and conclusions addressed solely to the reopened record.

Findings of Fact
(First Phase of Hearing)

General Tire and Rubber

Its Composition and Scope

22. RKO General, Inc., licensee of the facility at issue, is a wholly-owned subsidiary of The General Tire and Rubber Company; General Tire is a large conglomerate with headquarters in Akron, Ohio and New York City The Fortune Directory of the 500 Largest U.S. Industrial Corporations ranks General Tire 97th for 1968 and 90th

for 1967. Fortune, May 15, 1969, pg. 170 (Official Notice Taken). General Tire's stock is, of course, sold on the New York Stock Exchange. Voting stock numbers about 17 million shares. Stockholders number about 40,000. Aside from brokers and their representatives, no single stockholder holds as much as 3% of the stock. The O'Neil brothers, Thomas O'Neil is Chairman of the Board, M. G. is Presimembers of the O'Neil family have some stock interest. Thomas O'Neil is Chairman of the Board, M. G. is President, and John a Director.

factures and distributes a wide variety of products and furnishes numerous services. Besides automobile tires, General Tire pro0 factures and distributes a wide variety of products and furnishes numerous services. Besides automobile tires, General Tire produces and distributes: rocke power plants; rocket propulsion systems; chemicals; space system components; military ordnance components; metal and wrought-iron goods; electronic equipment; metals; chemicals; plastics; and rubber goods. In the field of services, it furnishes: architecture; engineering and construction management; commercial air transportation; theatres; outdoor advertising; and community antenna television (CATV)[1]

---

[1] General Tire owns numerous CATV facilities in Arizona, California, Kansas, Mississippi, Missouri, New Mexico, Oklahoma, and Texas. It also owns a substantial interest in, and is in the process of obtaining control of H and B American Corp., the largest CATV operation in the country.

Broadcast Interests

24. Among the services sold by General Tire, not noted above, are radio and television broadcasting. RKO General, Inc., under which title General Tire handles the bulk of its broadcast business, is licensee of standard, F , and television stations in Boston, New York, and Los Angeles. It is licensee of standard and television stations in Memphis and has a construction permit for an FM station there. It is licensee of a standard broadcast station in Bethesda, Maryland, and an FM station in Washington, D. C. Through another subsidiary General Tire holds license for a UHF station in Hartford, Connecticut, which furnishes a subscription television service. Through a Canadian -owned corporation and RKO, General Tire is also licensee of standard, FM and television stations in Windsor, Ontario. Since 1942 it has operated the Yankee Network, which, in 1942, had about 25 affiliates, as well as the Colonial Network, a subsidiary programming service. [2]

Some Contributions to Broadcasting

25. Technically, RKO has been active in the field of radio. In the 1940's, it experimented with FM broadcasts from Mt. Washington, the highest point in New England. In 1948 it moved that operation to Boston (WNAC - FM, later WRKO). At WGMS - FM in Washington it claims

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2 At one time RKO had a controlling interest in the Mutual Network, the largest radio network in the nation, having 569 affiliates. It sold this property in 1957. It also operated the Don Lee Network for some eight years, a west coast network having about 45 affiliates.

leadership in the field of stereo-broadcasting. In 1950 it developed a technique for filter treating light projection sources for film and cameras which became widely used in the industry. In 1951 it developed a Gamma corrected modulator for television transmitters. In 1952 it developed an automatic video control. In 1953 it developed a system of P. F. patching for emergency power cutback of television transmitters. In 1955 it developed an automatic control of set -up or black level for transmission of network video, thus overcoming certain distortion problems. In 1961 it became one of the first to remotely control a 50 kw AM transmitter. In 1963 it pioneered the development of dual horizontally and vertically polarized FM signals. In the same year it pioneered quartz lighting for TV remote pickups. In 1964 it claimed to be the first station to install permanent studio, control room type color remote setups. These installations were located at Shea Stadium and Madison Square Garden. In the same year, it claimed a first in utilizing a spectrum oscilloscope to monitor modulation percentage of an FM transmitter. In 1964 it also erected the tallest self-supporting antenna tower in the East (1066 feet). Located in a hurricane zone, the tower is designed to admit structural failure, only, at a wind velocity of 251 miles per hour. In 1964, RKO also pioneered and developed the first parallel transmitter operation in the nation, a development that has found favor with a number of other television stations.

26. RKO pioneered subscription television. In 1960 it applied for authorization to conduct subscription TV in Hartford over its UHF station there, WHCT. RKO was the only broadcaster to conduct such a trial. It pledged expenditures of up to $10,000,000 to make the effort.

The trial is now in its fifth year and serves 7,000 customers. Information on, and analysis of, the operation has consistently been furnished to the Commission.

27. RKO has contributed to educational broadcasting through financial gifts and the making of equipment and program material available to educational stations. In New York it pledged a total of $350,000 to the educational stations there. In Los Angeles it similarly pledged $100,000. In Memphis $78,000 in cash and equipment was donated to the educational station. Gifts have also been made to Pepperdine College for a speech improvement project and equipment has been donated to Emerson College for its television course.

28. RKO has also contributed to the development of new program sources for television. It experimented with live programming but decided that costs were prohibitive. It then turned to feature motion picture film. There it encountered resistance from the movie industry. However, before 1955 it had bought some 30 feature lengh films from the Bank of America and in 1955 it acquired RKO Radio Pictures, Inc. and with that company over 600 feature length films. These steps pioneered the presentation of movies over television and aided RKO's Los Angeles and New York stations in becoming economically viable in highly competitive markets. RKO has also either produced or participated in the financing of other material for television programs. These productions have appeared not only on RKO -owned but on other television stations. Included in production efforts in this area are such features as: Ladies of the Press, In Search of a Solution, Hollywood Backstage, Firing Line, Politics '64, Marcel Marceau, Surf's Up, Hollywood A -Go -Go, Man in Space,

Fashion: Italiana Style, Matisse, International Aero Classic, the Great Mini-Skirt Rebellion, Festa Italiana, Murray the K at Shea, The Plundered Art of Europe, The Al Capp Show, Rembrandt Exhibit. Also included are a number of sports features including: Griffith-Gonzales Fight, 59th Annual Millrose Games, 47th Annual Knights of Columbus Meet, ICAA Tract Meet, Invitational Tennis Tournament, Tiger-Griffith Championship Fight, National Horse Show, Turf Classics. RKO has operated a Washington New Bureau for several years and, through that Bureau, has produced both national and local public affairs programs for its stations as well as for syndication.

Method of Operation

29. General Tire and its subsidiaries are a highly integrated organization, Out of the conglomerate's headquarters come policies which govern its activities. The organization is not, however, leaderless nor, on the basis of this record, does it fail to present focus for the assessment of resonsibility for its acts. Thomas F. O'Neil, Chairman of the Board of General Tire, John B. Poor, President of RKO General, Inc., Hathaway Watson, President of RKO General Broadcasting Division of General Tire, and Malcolm C. Klein, Vice President and General Manager of KHJ - TV, as well as numerous other corporate officials, appeared and testified in this proceeding. Whatever curiosity existed over the internal operations and policies of General Tire, RKO, and KHJ-TV did not go unsatisfied in this record by any dearth of witnesses competent and available to testify on the subject.

30. RKO, or predecessor General Tire subsidiaries, have operated radio stations for 25 years. KHJ-TV was acquired in 1951. The station, under RKO, has never had a network affiliation.

31. The policy of RKO is to have management aware of community needs and to present programs which inform and stimulate interest. The objective is to broadcast programs which find acceptance and provide amusement, relaxation and, at times, instruction. RKO requires station management to provide these things as well as to become involved in community affairs, and maintain sensitive relationship with the community. Responsibility for the foregoing rests with local management but headquarters inspects, encourages and insures compliance with company policy.

32. RKO believes that through orientation with the communities served its stations can be sensitive to community need and be able to attract audience. RKO has some network affiliated stations and some not so affiliated. It has stations located in different parts of the country. Because of these factors it does not consider it feasible to originate programs from a single source.

33. Degree of delegation of authority to the local level is the responsibility of national headquarters staff and is accomplished through the hiring of station managers. These, subject to headquarters approval, select staff such as program directors who have a voice in the station's relationship with the community both on and off the air. RKO believes the selection of good men is important and that station managers are not interchangeable. As a matter of policy, each RKO station is required to "take into account" the needs and tastes of the community; the program plans

of other stations in the market; the station's capabilities"; and the availability and cost of programs.

34. RKO believes it cannot compete with network affiliates on national and international news and documentaries. Nor, do RKO stations editorialize. RKO takes the position that if need is met by other stations, duplicating effort by it is unnecessary. RKO program format vary between stations.

35. RKO headquarters is not passive on programming. It approves general program formats and reviews program schedules in light of the several stations reasoning and headquarters' Knowledge of market characteristics. Statistics are required from the stations on program categories to assure that pledges to the Commission are kept. Stations are monitored from time to time. Lists of feature films to be presented are reviewed and occasionally changes are suggested. Headquarters participates in the development of public service vehicles. In the production or acquisition of films for station use headquarters consults frequently with the stations concerning needs and uses.

36. The theory is that the station plays a major role in programming to meet a corporate "goal" of community service. Headquarters' function is one of stimulating, reviewing and inspecting programming with ultimate responsibility for approval of the programming presented by the station.

37. It is the policy of RKO to insure that stations comply with FCC rules. Headquarters provides legal and engineering assistance and from station reports satisfies itself that rules requirements are being met. Headquarters has a continuing interest in Commission policy pronouncements.

When possible, it seeks to advance Commission objectives. When it decides it should, it makes in -depth studies alone or with broadcasters and comments to the Commission on the results of these studies. It has participated in this way in numerous rule making proceedings.

Some Economic Data

38. RKO asserts that it has had a considerable financial struggle at KHJ - TV. It acquired the station in 1951. It reported net losses for the first four years and for two of the next four. By fiscal 1960, however, it had recouped early losses and moved into an overall profit position. It asserts that resources derived from its other enterprises enabled it to sustain the losses until it acquired a profit position.

39. An economist testified that during the first third of KHJ - TV ownership by RKO the station sustained financial loss; during the second third it experienced sub-standard profitability; and during the last third the station showed good profitability and return relative to past experience. Higher profitability the economist attributed to greater expenditures for programming which drew more audience and hence more advertisers.

40. Before tax, operating profits earned by Los Angeles stations in 1965 totalled $27 million with an overall profit return of 33.4%. KHJ-TV shared about 6% of the total profits. Its shares of Los Angeles TV profits for other year was: 1957 - 4.1%; 1958 - 1.1%; 1959 - 4.3%; 1960 - 1.8%; 1961 -4.1% 1962 - 5.6%; 1963 - 6.4%; 1964 - 8.1%.

41. In 1965 in the 106 markets in this country with three or more television stations, before tax, profit margins for

the stations were 34.9%. KHJ - TV profit margin was 19.8%. In those markets having less that three stations, similar profit margin was 19.7%.

Personnel

42. Liaison between General Tire and that part of its radio interest to which KHJ- TV belongs is largely the responsability ot Hathaway Watson. Watson is a graduate of Harvard and of the Harvard Graduate School of Business Administration. From 1943 to 1951 he was with the Federal Government at Lend - Lease, the State Department, and the National Security Resources Board. In 1951 he went with Booz, Allen & Hamilton, management consultants. There he became a partner in charge of the Washington office. He left Booz-Allen to go with General Tire in 1959 after having served a year as consultant on General Tire's broadcast interests. Since 1963 he has been a member of the Research Committee of the National Association of Broadcasters. In 1965 he served on the Council for Television Development and was Chairman of that organization's "Research Committe." Sam Slate carries the title "Vice President, RKO General Broadcasting." Slate has held the title since January 1964. He is a graduate of the University of Georgia. He has been in broadcasting more than 30 years. He has been with United Press, CBS News and Press, Phillips H. Lord, Inc., U. S. Maritime Service, and the British Broadcasting Corporation. He has been a Vice President of CBS and was once General Manager of one of its stations, WCBS, He has written and produced numerous television programs. He has written a book on "Broadcasting" and was President of the New York Broadcasters Association. For his productions he received a Peabody Award and a Presidential Citation.

43. Individuals who play a role in supervising the day to-day operation of KHJ-TV included:

Malcolm C. Klein, KHJ - TV's manager (he bears the title "Vice President and General Manager, KHJ - TV") is a native of Los Angeles. He graduated from the University of California. Entering broadcasting in 1948 at KLAC - TV, now KCOP, Los Angeles, he moved through the ranks: stage department, direction, production, head of film department and manager of operations. In 1953 he went with KABC-TV in Los Angeles in the sales department. There he became Assistant General Sales Manager. In 1959 he went to New York as Vice President and General Manager of WNTA, Channel 13, Newark. In May 1960 he returned to Los Angeles as General Manager of KHJ – TV. He lives in Encino, California. He has served on the Board of Governors of the Academy of Television Arts and Sciences, on the District Attorney's Advisory Council, on the Public Relations Committee of the Southern California Symphony Association, and on the City of Hope Board of Trustees.

Hugh F. Del Regno is Controller of KHJ - TV. He has been with the station since 1963, having previously worked for Curtis-Wright and NBC. He has a degree in managment and accounting from Fordham and a master's degree in business administration from New York University. At the station he has responsibility for auditing and accounting, personnel administration and building maintenance. He belongs to several professional organizations and the Urban League (Los Angeles Chapter), the U.C.L.A. Art Council, and the Los Angeles County Museum of Art (charter member).

Wally Sherwin is Director of Programming at KHJ - TV. He has lived in the Los Angeles area 20 years. He went to Northwestern University. He has been in broadcasting or show business for nearly 30 years. He is on the Mayor's Music Advisory Board (Los Angeles), is a member of the National Association of Television Programming Executives, the Academy of Television Arts and Sciences, the Hollywood Advertising Club and the Milline Club. He has assisted several civic groups in fund -raising drives and is active in youth organization centered around three local high schools.

Charles P. Dwyer is General Sales Manager of KHJ - TV. He has been in the radio sales field since 1946 and has worked for numerous broadcast stations, network and advertising agencies. He has been with KHJ - TV since 1964.

Allan Moll is Director of News and Public Affairs at KHJ - TV. He started out in Utah in law where he practiced for seven years. He then shifted to journalism. For 27 years he has been active in the broadcast news field. He was with two Salt Lake City radio stations, was news editor of the Inter-mountain Network, and was regional correspondent for an NBC news show. He was twice nominated for Peabody and Sylvania awards. He was chairman of the Governor of California's Committee on Emergency Broadcasting and member of a local committee on reporting of civil disorders. He is a member of the Radio Television News Directors Association, the Utah State Bar Association, and the Radio and TV Law Enforcement Committee of the National Conference of Christians and Jews. He is also co-chairman of a division of the

United Jewish Welfare Fund. In the past he has headed the Utah Heart Fund Drive and has been treasurer of a home owners association.

Bryan T. Cole is Manager of Operations and Facilities at KHJ - TV. He is a graduate engineer (University of Oklahoma B. S.) and has taken additional electrical engineering work at other universities and in the Army. He is a registered electrical engineer in the State of California. He is Vice President of the Long Beach Chapter of the California Society of Professional Engineers, is a member of the National Society of Professional Engineers, the Institute of Electrical and Electronic Engineers, and the Society of Television Engineers. He is active in a number of civic organizations in Long Beach.

Terry Anderson, the Director of Film Programming at KHJ - TV, is a native of the Los Angeles area. He joined KHJ - TV in 1958, as assistant film editor after one year with Desilu Studios. He lives in Canoga Park, and is a member of the Knights of Columbus, Catholic Press Council, and U.S. Army Reserve.

Mark Davidson has been eith KHJ-TV since 1964. In early 1965 he started broadcasting an interview program which later was carried once a week. The program was called "Reporter at Large." Before joining KHJ - TV he was with the Steve Allen Show for a year, and before that spent nine years as a writer for documentary films. Programs he worked on won two Academy Award. He has an M.A. from Columbia and a B.A. from U.C.L.A. He has worked on a newspaper and for a news magazine.

Ascertainment of Community Need

44. Except for the requirement that company policies be adhered to, there is no evidence that General Tire or RKO headquarters attempt to intrude upon the autonomy of station managers insofar as the day -to -day programming of their respective stations is concerned. During the most recent license renewal period, KHJ - TV personnel met with those whom they considered to be civic leaders. Monthly reports on such meetings were sento to RKO headquarters. The subject of the meeting was discussed at staff conference. In a year and a half, 382 contacts were made. KHJ-TV also furnished speakers for civic affairs, thus, allegedly, affording station personnel an opportunity to discuss with organization leaders the television needs and desires of their respective groups.

45. As noted in the biographical sketches above, key KHJ-TV personnel are associated with a number of civic organizations. Klein has lived in Los Angeles most of his life and has worked with many civic groups there. Wally Sherwin has lived in Los Angeles 20 years and is involved in youth activities. Allan Moll, as a newsman, is in regular contact with local political figures. With the public affairs director he maintains contact with local civic groups. Mark Davidson, producer of the "Nine on the Line" show, reports regularly on program ideas picked up from community leaders and others, At KHJ - TV telephone and mail comments on programs are digested and sent to the General Manager and to the Program Department. From time to time when a new program is presented, public reaction is solicited from the audience.

46. This then is KHJ - TV's method of ascertaining community need. Assertedly, it grew out of a management meeting held at KHJ - TV in 1962 pursuant to a directive from national headquarters setting forth steps to follow in maintaining community liaison. A staff member was assigned the task of compiling community activities in which the KHJ - TV staff was involved. All RKO personnel were alerted to a corporate policy of paying dues and fees involved in civic participation. A Speakers Bureau was discussed at the meeting and a list of the ten most pressing local civic needs was compiled.

47. Also, in 1962 a committee on community needs was established with an RKO Division Manager for Radio and Television in Los Angeles, as Chairman. One of the members of the committee prepared a survey of the religious community in the area, and a status report of personnel activity in obtaining cooperation with religious groups was also prepared. A list was made of religious groups, together with names, addresses, and telephone numbers. The latter list was circulated among the program staff at KHJ-TV. Later a more detailed analysis of the religious composition of the area was made.

48. In 1963 a management meeting was held for KHJ-TV personnel at which discussion was held on procedures for handling listener reaction and staff-identified area needs. Thereafter KHJ - TV personnel submitted, from time to time, reports on area needs. These reports were exchanged between standard broadcast personnel and television personnel.

49. Advanced as an example of RKO's community-service policy in action is the following incident: In January

1963, Malcolm Klein had lunch with the television chairman of a forthcoming Brotherhood Week observance. After luch, Klein told station personnel about the event and told officials of a sponsoring organization of people at KHJ - TV who should receive news releases on the event. Klein also called to the attention of an RKO executive that a seminer was being held on police and community relations. As an outgrowth of this advice the RKO executive attended the seminar. Thereafter, the executive circulated to RKO program personnel a recommendation that a program should be put on the air relating to racial problems. In the meantime, Klein was advocating by way of memorandum to his staff that a theme of racial tolerance should be a year-round project. Such activity as this culminated in four programs presented over KHJ - TV, once a month, called "Rearing Children of Goodwill".

50. In 1963 KHJ - TV commissioned a college professor to do a monograph on racial problems in the Los Angeles area. In the Fall of 1964 KHJ - TV paid Frank N. Magid Associates $10,000 to survey and prepare a report on the programming opinions of the Los Angeles viewing audience (of which more later). Program audience rating services have also been employed by the station.

51. About ten years ago, a consensus of conglomerate opinion concluded that there was a need for quality motion pictures - especially sophisticated adult films in television prime time. Since that decision, other Los Angeles television stations have been telecasting movies. General Tire and Rubber, RKO and KHJ - TV have, since then, been exploring other sources of television programming.

On the Air Operation

Some Favorable Aspects of KHJ-TV's Programming

Promise vs. Performance

52. During the composite week for the license period December 1, 1962 to November 30, 1965, an analysis of KHJ-TV program logs submitted with its renewal application shows that the station broadcast the following types of programs in the following amounts:

Entertainment (including special language programming)	86.5%
Religious	1.5%
Agricultural	.375%
Educational	3.75%
News	3.375%
Discussion	1.5%
Talks	3.0%

The application filed by KHJ-TV for the renewal period covered in the table above predicted the following:

Entertainment	89.6%
Religious	1.1%
Agricultural	.4%
Educational	2.0%
News	2.9%
Discussion	1.0%
Talks	1.8%
Special language	1.2%

Programming

53. In the next 32 paragraphs are set forth some of KHJ - TV's programs that lay particular claim to serving the public interest. In making its program showing KHJ-TV was not limited to any particular period of time. It will be recalled that the station was acquired by General Tire in 1951. As will be shown later, the station's broadcast day lasts all the way from 16 to 22 hours. Thus, in reading the following paragraphs it might be well to bear in mind that the programs described are extracts from some 100,000 hours of air -time utilization. It will be noted that frequently descriptions of programs or program series are unattended by facts on duration of programs and/or program series. To have excluded programs from findings because of this failure would have been unfair to KHJ-TV. The record leaves no room for doubt that many programs and program series whose duration is shrouded in mystery in the record were in fact broadcast. Accordingly, it is unsave to make assumptions of time span occupied by these programs unless length or duration is specified. It might also be well to remember that even when program length is specified, the inference does not lie that the time period was fully occupied by program material. There is no evidence in the record that KHJ-TV abjured the common station practice of honeycombing program material with spot announcements. There is, similarly, no evidence that in the presentation of motion pictures it failed to eviscerate them and replace unused parts with commercial continuity. As will be seen later, KHJ-TV had lots of commercial spot announcements to locate amid its programing.

Entertainment

54. In the entertainment category, as has already been noted, a staple of KHJ - TV's programming has been the presentation of movies. Some of these claim excellence. Richard III was presented with attendant happenings in celebration of Shakespeare's birthday. A movie series entitled "Cinema IX" included: The Sky Above, The Mud Below; A Taste of Honey; This Sporting Life; Waltz of the Toreadors; Divorce Italian Style; Billy Budd; Two Women; School for Scoundrels; Black Orpheus; David and Lisa; Ballad of a Soldier; The Entertainer; Room at the Top; My Uncle, and Les Miserables. For about a year and a half on each Saturday morning a Spanish language film was aired. A series of plays produced by the British Broadcasting Corporation was carried which included: Julius Caesar; The Rivals. Anna Karenina; Antigone (Alnouilh's); Wuthering Heights; Midsummer Night's Dream; and She Stoops to Conquer. A series called "Play of the Week" included: The Iceman Cometh; World of Sholom Aleichem; Rashomon; Waiting for Godot; Lullaby; The Dybbuk; and Burning Bright. A series, "Spread of the Eagle." another BBC production carried by the station, included adaptations of the Roman plays of Shakespeare

55. KHJ -TV has presented some concerts and operas. In connection with the following programs, the station went to great lenghts in the expenditure of time, effort, and money to carry the programs on tape and in a technically excellent fashion: Promenade Concert -a two-hour concert by the Hollywood Bowl Sympony Orchestra under the direction of Arthur Fiedler and featuring the "Chanteurs de Paris"; An Evening at the Hollywood Bowl. Andre Kostelanetz conducting the Hollywood Bowl Sym-

phony Orchestra in an All -Gershwin Night featuring pianist Earl Wild; An Evening of Opera – a two-hour Hollywood Bowl concert featuring Maurice Abravenal, director of the Utah Symphony Orchestra, and Jan Peerce and Mary Costa, vocalists; Hollywood Bowl Concert – 1965 – a 90-minute program again featuring Andre Kostelanetz leading the Bowl orchestra in an evening of Gershwin Music, with singers Martina Arroyo and Robert Mcferrin and pianist Lorin Hollander.

56. KHJ - TV also aired filmed versions of Verdi's "La Traviata," "Rigoletto," and Puccini's "Tosca"; "An Evening with Theodore Bikel," a taped concert of folk music; and a filmed production of the Red Army Singers and Dancers. On Symphony Orchestra Telecast Benefit, KHJ-TV carried an hour -long concert by the Los Angeles Symphony Orchestra. The Orchestra was conducted by Zubin Mehta and featured Jack Benny.

57. KHJ - TV has also telecast programs in the field of art. At an exhibit of Mexican Art at the Los Angeles Museum, KHJ - TV produced a program on which Vincent Price was featured. The station also produced a program featuring an artist named Leon Saulter. Twice the station carried programs showing the paintings of Harry Lackman. The opening of the UCLA Art Center was signalized by KHJ - TV through a showing of a Matisse exhibit. The "Art and the Dance" was filmed in color by KHJ - TV in an art gallery and presented over its facilities in an effort to show art and dance in single form. A film on the life of Michelangelo was presented, as well as a film on the travels of the Pieta. "Paintings in the White House," narrated by Fredric March, was also carried at KHJ - TV.

58. Popular music and "personalities" were aired by KHJ-TV. 'Cheerio A -Go -Go" was filmed in London especially for the station, The series included ten top English recording acts including the Beatles, The Rolling Stones, and Herman's Hermits. A montage tour of London night life was also included. The production of this series involved an unusual expenditure of money, time, effort and personnel on the part of the station, A program series entitled "Hollywood A -Go -Go" appears to have been a result of the foregoing programs. These latter programs were one hour in length and pioneered teenage discotheque-type television programming. They were carried over KHJ-TV and were later syndicated. "Aloha A -Go -Go," a one-hour program, was filmed in Hawaii. A series of remote programs was presented form the Hollywood Palladium and Moulin Rouge. Top recording stars, Miss Teen USA, and 20 different "bands" were featured. Also presented were "Darin at the Grove", an hour -long program from the Ambassador Hotel in Los Angeles, and "A Salute to Eddie Condon." For a year and a half the station broadcast a live program called "Ninth Street West." This program presented local entertainment groups plus headline guests. It was desgined to appeal to teenagers and young adults and included an audience participation feature.

59. For four years ending in 1964, KHJ -TV annually carried high-lights of the Tournament of Roses Parade. A Flag Day Parade was also carried, as was a Christmas Parade. A sneak preview of the "World Travel Show" was carried. A 90-minute color travelogue film called "Flight of the Magellan" was presented. Those attending a movie preview of "Those Magnificent Men in Their Flying Machines" were aired on KHJ - TV. A half-hour coverage of

the premiere of "Lord Jim" was presented from a theatre lobby and coverage was given to behind the scenes activity in connection with making that movie. One hour coverage was given an antique auto show.

60. In 1964 KHJ-TV broadcast a 19-hour continuous pro- - gram on behalf of the Cerebral Palsy Foundation, The program featured Hollywood celebrities and reception centers set up in nearby communities for the receipt of donations. A similar program was carried in 1965, Since 1960 KHJ - TV has carried live, and exclusively, the Miss California Beauty Pageant.

Children's Programs

61. In the field of children's programs, KHJ - TV broadcast programs both morning and afternoon. Much of this programing has been cartoons and animated subjects with a master of ceremonies urging children to develop such beneficial traits as sound health habits. KHJ - TV also presented motion pictures of especial interest to children. David Copperfield, Oliver Twist, King of the Khyber Rifles, Gunga Din, Kidnapped, A Christmas Carol, The Prince and the Pauper, Gulliver's Travels and Call of the Wild were presented. A two -part film of the Moscow State Circus was shown as was a series of Shirley Temple Films.

Public Affairs

62. Beginning in September 1964, KHJ - TV carried a live, one -hour, afternoon program entitled "Nine On the Line". This program featured station personnel as well as guests, and at times telephone calls from viewers. On the program a variety of subjects was discussed including: Los Angeles racial tensions, social maladjustments and mental

illness, California's local housing referendum, problems of public schools; police review boards, politics, nuclear war, alcoholism, unethical business practices, and activities of the Los Angeles Zoo. Each week the most interesting program was edited and broadcast for one -half hour at night.

63. KHJ - TV has regularly carried Presidential messages and news conferences. Such events as the Kennedy assassination were covered by the station using RKO's own staff. The station has also carried a Los Angeles Mayor's speech to the City Council and the annual message of the Superintendent of Schools. The station carried frequent reports on the Republican Presidential Primary of 1964. Many hours of remote coverafe were given the Republican Presidential Convention in that year. Goodwin Knight and Mort Sahl covered the Convention for the station. "Politics -64," featuring Samuel Lubell, produced by RKO, was a series carried on KHJ-TV in connection with the 1964 Republican Campaign.

64. In December 1962, KHJ - TV began a series of half-hour monthly programs on Sunday afternoon entitled "Project Today," directed at cities within the station's coverage area. Public officials were featured. In 1963 a station newsman was featured in 18 half-hour reports on his travels through the Western Hamisphere. From 1963-65, a series entitled "In Search of a Solution" was carried. The RKO-produced series featured 25 minute -and -a -half to five -minute interviews with various persons on Civil Rights (1963), Presidential Succession (1964) and Communist China (1965). "Viewpoint Washington" was carried from June 1964 to October 1964. An RKO Washington News

Bureau production, this program was broadcast weekly for 21 weeks featuring a panel discussion utilizing members of the Washington press corps. "Ladies of the Press" was a weekly 30-minute program running for 35 weeks produced by the RKO New Bureau, consisting of a panel of wonen journalists interviewing prominent personalities in the news. A "New Year's Special News Roundup" ran for an hour on January 1, 1964, and "Year Past - Year Ahead" ran for the same duration on the last day of the year. Both programs were panel discussions.

65. In March 1965, KHJ - TV expended much time, effort and money in presenting a two -hour program covering the Los Angeles County Museum of Art. Similarly in 1964 KHJ - TV carried one and a half hour coverage of the dedication of the Los Angeles Music Center. KHJ - TV also aired, in connection with the dedication of the Memorial Activities Building at the University of California at Los Angeles, a special program showing details of the building. In 1963 the station broadcast the Diamond Jubilee Banquet of the Los Angeles Chamber of Commerce, and in 1964 broadcast the Orange County Show celebrating the county's similar anniversary. Students from the county participated in the production of the program. In 1964 KHJ - TV broadcast two specially produced half -hour programs, one on the subject "Do I Step In and Intervene or Do I Mind Own Business?"; the other reporting student sit-ins at the University of California. "Joe Dolans's World of People," featuring interviews with prominent people, was carried from Janaruary 1963 to April 1964. At first it was carried weekdays for a half hour, later it was cut back to a monthly basis and finally, intermittently, for 15 minutes. "Now Listen Lady," a live discussion program on women's

affairs, was carried for 15 minutes once a week from May to September 1963. In 1965, Dr. Linus Pauling was on the station for a full hour on a program reporting on a "Pacem in Terris" conference he had attended. In the spring of 1964, a discussion program featuring a local commentator was carried by KHJ - TV daily at midnight for a half hour. In October 1963, the station carried a one-half hour interview program with Madame Nhu. In 1965, a half hour documentary was carried on the State of Israel. A similar program was broadcast in the same year on the fight for freedom in captive nations. The " "Sam Yorty Show," a 90 -minute discussion series featuring the Mayor of Los Angeles, was carried. In 1965, the station broadcast a two -part documentary on the work of the Los Angeles County Attorney's Office. After December 1966 the station telecast a weekly series called "Dateline Campus." The program was produced by a teachers association and a college.

66. Throughout the license period, KHJ - TV carried interviews of five minutes duration on public affairs between interludes of movies. A number of representatives of civic groups were interviewed in this way. The station carried Theodore Granik's "Youth Wants to Know" program, and David Susskind's "Open End". The former program was a half-hour in duration; the latter an hour. KHJ - TV also carried RKO's produced series "Firing Line with William F. Buckley, Jr.", a one -hour discussion program with Buckley interviewing figures in the news. The "Al Capp Show, " a weekly one hour documentary, was also carried.

67. In April 1965, KHJ - TV broadcast a half hour pro-

gram " The Growing Crisis", presenting a controversy over the use of Mexican labor. In 1964, the station carried nine one-hour and three half-hour programs on a "Living Camers" series. These shows covered such subjects as gridiron rivalry, capital punishments, rehabilitation of juvenile groups, rretirement problems of air line pilots and a study of a Moslem leader. Also in 1965, KHJ-TV broadcast programs on "Crime and the Student" and "Inhale -Exhale" (on glue sniffing). In July 1965, the station carried 12 half-hour CBS network programs entitled "You Are There, " a historical series.

68. KHJ - TV carried a series of interviews with the Director of the Los Angeles Zoo who appeared on the program with animals. It also carried a station -produced program called "How the Southland Plays," a tour of Southern California resorts including Disneyland and the Los Angeles Zoo.

69. "The Truth About Communism, " featuring Ronald Reagan, was presented in 1963, and in 1964 the station carried a filmed documentary dealing with the paralysis of freedom of personal choice and the extremes to which conformity is carried out. In 1963, 1964 and 1965 the station presented 20 hour -long filmed programs entitled "Perspective on Greatness" portraying the lives of famous individuals and historical events. A one-hour filmed program called "Operation Moonshot" was aired twice in 1964. A half-hour program entitled "Your Heart and Mine", produced in conjuction with the American Heart Association, was aired by the station. The production highlighted findings presented at the Association's annual meeting.

News

70. KHJ - TV carried some news programs, largely on an irregular basis. Length and frequency varied. A typical day's schedule showed news capsules in the morning and early afternoon, a 5-minute newscast in mid-afternoon, a 15 -minute newscast in the evening, and closing news at the end of the day. All news was edited.

71. The station used AM and FM as well as TV personnel on news. Newscasts normally originated in the newsroom but a camera was set up for bulletin stories on short notice. News programs included news -sound -on -film, silent -film, video -tape, and still -shots. Live shortwave reports also presented over slides or with an on-camera reporter using earphones. This latter technique was sometimes employed in reporting news furnished by other RKO stations or other stations cooperating with RKO.

72. Members of the KHJ-TV news crew regularly covered the Mayor's and the County Board's meetings. Excerpts from "Nine on the Line" and other such excerpts were utilized on its evening newscast. These newscasts have covered special reports on problems such as smog. Information on persons wanted by the FBI and local law enforcement agencies was also regularly broadcast near the close of the day on KHJ-TV.

Special Events

73. KHJ - TV has aired important local events shortly after the events and in doing so preempted regularly scheduled programming. Coverage of the Watts riots was given

live, as well as on film. Shortwave radio and three remote units were employed. Similar coverage was given a dam disaster, forest fires, and a major fire in a movie studio. KHJ - TV employs news "stringers" as sources of local news.

74. The KHJ - TV newsroom has three national and one regional press service and radio monitors covering dispatches of police and fire departments and of the sheriff's office. KHJ - TV News has one mobile unit and shares two others with KHJ-radio. A survey made by a news service showed that in 1966, except for NBC and CBS owned -and -operated stations, KHJ - TV carried more locally produced news that any other station in the market.

75. During 1963, KHJ - TV aired 26 Los Angeles baseball games, the third year of such coverage. During 1963-64, KHJ - TV aired 12 Los Angeles Lakers basketball games' During the same season, five National Hockey League games of the Chicago Blackhawks were telecast. When KHJ - TV lost the contract for major league baseball, it turned to golf and other sports. In 1963, it carried the Frank Sinatra Golf Tournament at Palm Springs and in the same year presented a 90 -minute film of golfing instruction featuring leading professionals. In 1964 it carried the San Diego Open, In 1965, it carried the Phoenix, Houston, and Greensboro Open tournaments, the PGA Open (three matches), the New Orleans PGA, the PGA Million Dollar Golf (two matches). The Haig and Haig Tournament was produced in that year by KHJ - TV. In 1964, KHJ - TV

also presented a 45-minute film for Little Leaguers. In 1965 it carried "The Old Ball Game," a filmed, one -hour. specially commissioned broadcast commemorating the opening of the baseball season. During its last license period, the station carried six hours of special tapes made at the Little World Series in Williamsport, Pennsylvania.

76. In 1963, KHJ - TV carried coverage of the West Coast surfing finals. In 1964, it telecast the Malibu Surf Riding Championship. In May 1965, it carried filmed coverage of a surfing championship competition in Hawaii. The following month, it carried "Strange New Breed," a documentary film on surfing. Also in June it carried 90-minute coverage of a surfing competition Hermosa Beach.

77. KHJ - TV has carried a number of Los Angeles high school championship games in baseball, basketball, track and football. It carried two-hour coverage of the 1963 California Inter-Scholastic Federation Swimming Championships. In 1964 it gave one and a half hours to the same subject. A 75-minute telecast of the 1963 finals of the Los Angeles AAU Swim Meet was carried. KHJ-TV carried four Whittier College Football games in 1964. In October of that year it carried "Olympia 1964," a preview of the Olympics. 'Roaring Wheels," a series of four films on automobile racing, was carried during May 1965. Highlights of the 39th Annual West Coast Relays were filmed and telecast in 1965. Filmed highlights were also shown of the U.S.-Soviet Union track meet. The 1964 NCAA Ski Championships were also carried.

Education

78. During the license period, KHJ - TV broadcast five days a week a series of half-hour instructional programs

entitled "Spectrum." Sometimes these programs were repeated late at night. The programs were originally porduced by Los Angeles State College and later by Los Angeles school systems. The program subjects ranged from the banking system and international economics to nursing and photography. As an additional part of the "Spectrum" series, the following half-hour programming was also presented during the summer of 1963: "The Seminar on American Civilization". "Searchlight on Delinquency"; "Books and Ideas"; "Parents and Dr. Spock."

79. The station also carried a series of programs produced by Los Angeles State College called "Concourse." Featuring a wonan professor, the program sought to examine the concourse of books, youth and ideas. A series of French conservation programs entitled "En France" was also carried. This program was produced in cooperation with Hofstra College. A one-hour documentary film entitled "Invitation from Sam" was produced by the station in cooperation with the city school system. The program showed the numerous recreational activities available to young people in the area.

Agriculture

80. Each Saturday morning during the license period, KHJ-TV carried a regular weekly half-hour series of filmed programs addressed to agriculture. The programs were produced and furnished by the U. S. Department of Agriculture and were entitled "From the Ground Up."

Religion

81. During 1965, KHJ - TV carried four half-hour broadcasts entitled "Rearing Children of Good Will" produced in cooperarion with the National Conference of Christians and Jews. The program featured a number of prominent local civil figures. Also in 1965, KHJ - TV carried "Insight," seven and a half hours of taped dramas produced by a Paulist Father. Prominent Hollywood actors and writers contributed to the program. KHJ - TV has, since May 1963, carried "The Hour of St. Francis," a series of recorded dramas, produced by the Order of St. Francis. Prior to May 1963, the station carried a weekly half-hour religious program entitled "Way of Faith." Beginning in April 1965, it carried a half-hour Sunday series featuring sermons by Dr. Norman Vincent Peale, a program distributed by the Foundation for Christian Living.

82. In 1962, 1963 and 1964, KHJ-TV carried for one hour live coverage of the Christmas Eve services from a local Episcopal Church. On the same day in 1963, it carried a half-hour live program covering a local college Christmas Pageant. On the Sunday preceding and following Christmas, the sermon of a local minister was carried. For Easter in 1963 and 1964, services were carried from a local Episcopal Church. In 1965, the station carried the Los Angeles Choir singing Brahms' Requiem Mass for a local Presbyterian Church. Art work was also shown on this program. Bing Crosby narrated a film for Christmas Eve presentation produced by a Catholic priest and taped by KHJ-TV. The film was carried by all RKO stations including KHJ-TV. During a Christmas season, the station carried Art Linkletter's travels through the Holy Land with

music produced by the Westminster Choir in a program entitled "Christmas in the Holy Land."

83. In 1964, KHJ - TV, for the second year, gave 30-minute coverage to a speech given by a Methodist Bishop at an Annual Bishop's Laymen Luncheon. The station regularly broadcasts short pre-recorded inspirational messages featuring local members of the clergy. These are presented at the beginning and end of each broadcast day.

Special Aspects of KHJ-TV Programming

84. A program series featuring works of art included a broadcast of a Picasso Exhibit at an Art Museum. This was presented in prime evening time. It help promote a large exhibit of Picasso graphic work. The station promoted the sale of Picasso prints and $10,000 was thus realized. The money was turned over to the Art Museum. Later the works of another Spanish artist were exhibited at the Museum, those of Fausta de Lima. As already noted, a film of Marcel Marceau was broadcast. This was a one-hour program produced through the efforts of KHJ-TV. Recently, the film has been offered for syndication by "RKO Productions." KHJ - TV telecast twice in prime time a ballet program. KHJ -TV'manager, together with the prima ballerina, appeared on the program to encourage like cultural undertakings. During May 1967 KHJ - TV operated as a key station in the incipient, but eventually unsuccessful, network called "United" by carrying a program called "The Las Vegas Show." A series of 14 one-hour -per -week programs called "Therapy" was carried over KHJ - TV. The series was financed and produced

by KHJ - TV and was presented over the station in prime time. The programs were produced under the supervision of qualified psychologists and psychoanalysts. On weekdays for about six weeks KHJ - TV carried, for 15 minutes, a speech correction program. The program originated with a local college, Pepperdine. The programs were also later carried on the local educational station.

85. The series "Dateline Campus," see paragraph 65 above, was aimed at showing the community the services performed by a state college system. "On the Scene," a one-hour documentaru presented twice weekly during prime time, was intended to cover community activities. "Boss City," the weekly, live, teenage participation program, was designed to help bridge the generation gap. "Reporter at Large" featured during prime time excerpts, regarded as best, from the "Nine on the Line" program. The William Buckley program was produced by the station. KHJ - TV was the first area station to carry soccer games, the Los Angeles Toros, during their first season. An open-air amphitheatre operated by the City of Los Angeles has been promoted by the station through interviews with the director and featured performers.

Announcements of Civic, Charitable and Governmental Activities

86. Unpaid announcements on behalf of non-commercial interests were carried by the stations. In 1964 and 1965, 4,937 and 9,453 such announcements were, respectively, broadcast. During July 18-20, 1963, the station urged the public not to look at the eclipse of the sun directly because of the possibility of eye injury.

Expenditures for Programs

87. KHJ-TV has made a considerable effort to gain a share of the Los Angeles television market. Its expenditures for station operation have increased from 9 or 9-1/2% of the Los Angeles television stations' total for such expenditures during 1957 -1962 to 13.1% of the total in 1963, 11.5% in 1964 and 12.2% in 1965. Program expenses have risen from 30% of total expenses in 1952 to 61% in 1965. Considerable sums of money have been spent by KHJ - TV on programming. In the past six years it has contracted for 20 million dollars worth of programming. Its features film library cost $14 million. Some of its local programming has been expensive. Coverage of each Hollywood Bowl program has cost the station about $30,000. Cost of coverage of City Council meetings and the Mayor's press conference has run in the neighborhood of $1500 to $2000 for each such broadcast.

Audience

88. Although KHJ - TV has succeeded in making no appreciable gain in winning audience during prime evening viewing hours, it has won some audience in the Los Angeles market after 5:00 p.m. as indicated by this table which covers audieince trends for the period 1962-1966.

Time Period	*Los Angeles Market*	*KHJ-TV*
5:00 p.m. - 7:30 p.m.	+38%	+60%
7:30 p.m. - 11:00 p.m.	+26%	+25%
11:00 p.m. - Midnight	+24%	+56%

Favorable Reactions to KHJ-TV Operations

89. There are people in Los Angeles who speak favorably about KHJ - TV. In the indented material below their comments are summarized.

William Severns is the Chief Administrator of the Music Center in Los Angeles. He says KHJ - TV is "probably" the leading local station in popularizing and financing symphonic concerts in Southern California.

Talmadge L. Reed is Deputy of the Los Angeles County Museum of Art. He believes KHJ - TV is doing an excellent job in presenting art by means of television.

Eddie Albert is a movie actor and commercial television personality. He believes a great deal of expense, effort and concern is required to present such programs as KHJ-TV's coverage of the opening of the Art Museum. He participated in that program.

Dr. James Loper is Vice President of Community Television of Southern California, and General Manager of educational station KCET. He states that KHJ - TV has cooperated in the production of educational programs and has been friendly to KCET. KHJ - TV was the only Los Angeles station willing to provide free time for the "Spectrum" series. He believes such programs as "the arts" and "Hollywood Bowl" to be "unequalled". The station has assisted KCET with financial and other aid. He believes there is a place in the community for a station specializing in movies. He thought KHJ-TV's presentation of a news program during mid-evening hours a unique service.

Father Elwood Kieser is National Director of Radio and Television for the Paulist Fathers. He believes KHJ - TV's presentation of his program "Insight" in prime evening time free, reflects a policy of community service and dedication. It was the first station in the country to make the presentation. He believes the station to be imaginative and to serve artistic, educational and cultural interests. It has a good reputation by reason of such programs as "Nine on the Line."

Louis Arnold Pike is Radio and Television Coordinator for the California Teachers Association, Southern Section. He believes KHJ - TV's "Spectrum" and "Dateline Campus" programs, which his organization helped produce and present, served needs in the area. Few schools are equipped to produce television programs and must depend on stations for such production. KHJ -TV at one time offered air time which could not be utilized by his association.

Arthur Knight is Professor of Cinema at U.S.C. He likes the mechanics of KHJ - TV's presentation of motion pictures. He found cultural merit in the station's film library. He thought pictures presented during the station's most recent license period "splendid." In the professor's opinion, release date of movies is of no significance. Many of KHJ-TV's old movies have been excellent. Psychiatrists and critics have divergent opinions on movies. He opposed government interference in television station programming.

Bruce Robertson was once with Broadcasting Magazine covering the activities of West Coast stations. In his experience KHJ - TV's coverage of the Hollywood Bowl and art programs has been unique, In his view the station has been

imaginative in the use of motion pictures in a broadcast schedule.

Goodwin J. Knight is a former Governor of California. In his opinion, public affairs programs have been presented in a fair and impartial manner over KHJ - TV. He believes the station has an excellent reputation for serving the Los Angeles area public.

Joseph M. Quinn is Deputy Mayor of Los Angeles and Chairman, Los Angeles County and Cities Civil Defense Commission. He owns the City News Service. In his opinion KHJ - TV has carried programs on city government, aided civil defense, and has been fair and professional in covering news.

Inspector Edward Walker is Press Relations Officer for the Los Angeles Police Department. In his opinion KHJ - TV has been cooperative with the Police Department. He believes station representatives are interested in the community and law enforcement and that KHJ-TV has a good reputation in the community for responsible performance.

John J. O'Mara is Vice President of an advertising bureau. He believes KHJ - TV has a good reputation for serving viewers, community organizations without program imbalance and without impairing other stations' acquiring special use television. In his view it would be a waste of spectrum space for a Los Angeles frequency to be assigned to Orange County.

Dennis F. Shanahan is an advertising agency executive. On the basis of his considerable experience in advertising, he

has found KHJ - TV to have a good reputation, better than many stations, for responding to community program needs, interests and desires. The station's major strengths are mature movies, "Lively and reasonably literate" youth shows, "responsible" public affairs programs, good specials and responsible, imaginative people [staff] willing to become involved with advertisers. In his opinion such weaknesses as KHJ - TV has are generic to independent stations.

Dr. Wesley A. Young is Director of the Los Angeles Zoo. KHJ - TV has given him, and the Zoo, more air time than any televisions station except one where he appeared as paid talent.

Lawrence E. Houston is a Los Angeles school official., He noted that KHJ - TV has cooperated with the school system in presenting educational programs including "Spectrum," as well as some high school sports. There is considerable movement of school population in the Los Angeles area. In his opinion KHJ - TV's programs have served the entire area.

Awards

90. During 1963-66 KHJ -TV received the following awards or commendations. Academy of Television Arts and Sciences (Hollywood Chapter): 1964, "Emmy" for Hollywood Bowl telecast "Evening with Gershwin"; 1965, "Emmy" award for Hollywood Bowl telecast "Operatic Night"; 1966, "Emmy award for "Gershwin Concert". National Association for Better Broadcasting: Best entertainment on regional television, 1963, for "An Evening with Gershwin" and BBC Drama Series; nominated KHJ-TV for Peabody Award for "Impressions" program. Los Angeles City Council, 1963: Passed resolution commending KHJ and KHJ-TV for presenting the Mayor and Council's review of the City. Municipal Art Commission, 1963: Special award for cultural contribution for program "Symphony Under The Stars." Mayor Yorty 1964: Commendation for presentation of programs from Hollywood Bowl, Los Angeles Music Center and Los Angeles County Museum. In addition to the foregoing awards and commendations KHJ-TV lists approximately 44 more conventional citations from various groups, as well as numerous individual letters of commendation from civic leaders and viewers of the station in general.

Some Not So Favorable Aspects of KHJ-TV's Programming

Commercialization

91. Much of KHJ-TV's air time is devoted to the presentation of advertising. The station has no policy limiting the amount of advertising it will present. It does limit to 25% the amount of time it will carry commercial announcements during a half-hour period but permits the 25% to be averaged over a two-hour period. This allows, theoretically at least, 30-minute time segments to be devoted exclusively to purely commercial matter. In addition to program sponsorship, KHJ-TV sells 10, 20, 60, 90 second, and on occasion even longer, commercial spot announcements. About 60% of the station's total revenue comes from the

sale of national advertising. That business is handled by RKO's own national sales organization. During the 1965 composite week KHJ-TV reported presentation of 1132 commercial spot announcements. Its application for renewal estimates that its next renewal application would show 1430 such announcements.

92. For the 1965 composite week there were 117 14½ minute time segments during which two spot announcements were presented on KHJ-TV, 115 during which three were presented, 57 during which four were presented, and 52 during which five or more were presented. 88 spot announcements exceeded one minute in length.

Movies and Other Programming

93. The time between commercial announcements at KHJ-TV is, by and large, occupied by movies. Many of these are old, many are repeated and many feature crime.

94. Set forth below is the program schedule of KHJ-TV for the 1965 composite week. It is to be remembered that 1132 spot announcements of varying length were woven into the schedule.

Sunday, May 24, 1964

Time	*Title*	*Source*[3]	*Type*
7:59 A.M.	Sign On		
8:00	Sunday Big Babysitter (The Winner)	RC	Ent

[3] Legend — For all practical purposes "R" means film or filmed (recorded); "C," commercial; "S," non-commercial (sustaining); "Rel," religion; "Ent," entertainment; "Dis," discussion; "Ed," educational; "Ag," agriculture; "L," live.

Time	*Title*	*Source*	*Type*
9:00 A.M.	Sunday Theatre	RC	Ent
10:30	Ladies of the Press	RC	Talk
11:00	Our Miss Brooks (Boynton Play Acts)	RC	Ent
11:30	Million Dollar Movie (Man Who Knew Too Much)	RC	Ent
3:30 P.M.	Colgate Sunday Matinee	RC	Ent
5:00	Family Theatre (Young At Heart)	RC	Ent
6:30	Maverick (Greenbacks Unlimited)	RC	Ent
7:30	Theatre Nine (Gorgo)	RC	Ent
9:15	Theatre Nine News	LC	News
9:30	People Are Funny	RC	Ent
10:30	Encore (Indian Fighter)	RC	Ent
12:15	Sign Off		

Monday, February 17, 1964

7:38 A.M.	Sign On		
7:39	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Babysitter (Cont'd)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Down Three Dark Streets)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Latin Am: The Conquest)	RS	Ed

Time	*Title*	*Source*	*Type*
12:00 P.M.	News Headlines	LS	News
12:01	Searchlite/Delinquency (Eastern Wisdom)	RS	Dis
12:30	New Headlines	LS	News
12:31	Mr. District Attorney	RC	Ent
1:00	Cartoonsville	RC	Ent
1:45	Feature Page	LC	News
2:00	Million Dollar Matinee (Film: Born to Kill)	RC	Ent
2:01	Interview Sid Goldman (10")	LS	Talk
3:38	Interview Dr. Norman V. Peale (8")	LS	Talk
3:46	Interview Elizabeth Scott (4")	LS	Talk
3:50	Matinee News	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	The Bowery Boys (Paris Playboy)	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	Dobie Gillis (Wedding Bell Toll)	RC	Ent
8:00	Million Dollar Movie (Film) (The Codlitz Story)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Bright Leaf)	RC	Ent
12:03 A.M.	Clete Roberts News	LC	News
12:19	The Second Show (Film: Down Three Dark Streets)	RC	Ent
1:49	Spectrum (Latin Am: The Conquest)	RS	Ed
2:17	Suspects Wanted	LS	News
2:19	Devotional	LS	Rel
2:25	Sign Off		

Tuesday, April 7, 1964

Time	*Title*	*Source*	*Type*
7:38 A.M.	Sign On		
7:39	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Baby Sitter (Cont'd)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Young Stranger)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Home Nursing, Health Career Opportunities	RS	Ed
12:00 P.M.	News Headlines	LS	News
12:01	All America Wants to Know (Bomber Nobody Can Stop)	RS	Dis
12:30	News Headlines	LS	News
12:31	The First Show (Film: Mr. Blandings Dream House)	RC	Ent
2:00	Million Dollar Matinee (Film)	RC	Ent
2:12	Interview Jack E. Leonard (10")	LS	Talk
3:37	Interview Candy Johnson (6")	LS	Talk
3:43	In Search of a Solution (2")	RS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Sugarfoot	RC	Ent

Time	*Title*	*Source*	*Type*
7:00 P.M.	People Are Funny	RC	Ent
7:30	The Deputy (Chain of Action)	RC	Ent
8:00	Million Dollar Movie (Film – Last Outpost)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Gun Crazy)	RC	Ent
11:46	Clete Roberts News	LC	News
12:00 A.M.	Michael Jackson	LC	Talk
12:28	The Second Show (Film: Young Stranger)	RC	Ent
2:00	Spectrum/La State College (Home Nursing, Health Career Opportunities)	RS	Ed
2:30	Suspects Wanted	LS	News
2:32	Devotional	LS	Rel
2:37	Sign Off		

Wednesday, March 11, 1964

7:39 A.M.	Sign On		
7:40	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Babysitter (Cont'd)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Adventures of Capt. Fabian)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Latin Am: WW II)	RS	Ed

Time	*Title*	*Source*	*Type*
12:00 P.M.	News Headlines	LS	News
12:01	Community of Condemned	RS	Dis
12:30	News Headlines	LS	News
12:31	The First Show (Film: Annie Oakley)	RC	Ent
2:00	Million Dollar Matinee (Film) (Edge of Darkness)	RC	Ent
2:01	Interview Dr. William Bryan (9")	LS	Talk
3:37	Interview Allan Jones (7")	LS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Follow the Sun (Inhuman Equation)	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	Dobie Gillis (3 mil. Coins in the Fountain)	RC	Ent
8:00	Million Dollar Movie (Film: Boy On A Dolphin)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Love in the Afternoon)	RC	Ent
12:04 A.M.	Clete Roberts News	LC	News
12:20	The Second Show (Film: Adventures of Capt. Fabian)	RC	Ent
1:46	Spectrum (Latin America: WW II)	RS	Ed
2:16	Suspects Wanted	LS	News
2:17	Devotional	LS	Rel
2:21	Sign Off		

Thursday, October 17, 1963

Time	*Title*	*Source*	*Type*
7:39 A.M.	Sign On		
7:40	Devotional	LS	Rel
7:45	The Big Babysitter	RC	Ent
9:00	King and Odie	RC	Ent
9:15	The Big Babysitter (Cont'd)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Berlin Express)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Art of Theatre)	RS	Ed
12:00 P.M.	News Headlines	LS	News
12:01	Books and Ideas	RS	Dis
12:30	News Headlines	LS	News
12:31	Mr. District Attorney	RC	Ent
1:00	Cartoonsville	RC	Ent
1:45	Feature Page	LC	News
1:48	Interview Johnny Green (7")	LS	Talk
2:00	Million Dollar Matinee	RC	Ent
2:01	Interview Roland Rath (5")	LS	Talk
3:34	Herb Allen (6")	LS	Talk
3:40	Late Afternoon News	RC	News
3:45	Mighty Hercules	RC	Ent
4:30	Engineer Bill	RC	Ent
5:30	The Funny Company	RC	Ent
6:00	The Lone Ranger (The School Story)	RC	Ent
6:30	Our Miss Brooks (Kritch Cove)	RC	Ent
7:00	People Are Funny	RC	Ent

Time	*Title*	*Source*	*Type*
7:30 P.M.	Dobie Gillis (Taken to Cleaners)	RC	Ent
8:00	Million Dollar Movie (Fabulous World of Jules Verne)	RC	Ent
9:43	Special Featurette	LC	Ent
10:00	Clete Roberts News	LC	News
10:30	The Big Show	RC	Ent
12:00 A.M.	The Second Show	RC	Ent
1:30	Spectrum (Art of Theatre)	RS	Ed
1:58	Suspects Wanted	RC	News
2:00	Devotional	LS	Rel
2:05	Sign Off		

Friday, June 5, 1964

7:40 A.M.	Sign On		
7:41	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Babysitter (Cont'd)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: The First Yank Into Yokyo)	RL	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Focus on America thru Art)	RS	Ed

Time	*Title*	*Source*	*Type*
12:00 P.M.	News Headlines	LS	News
12:01	Hour of St. Francis (The Terrible Gift)	RS	Rel
12:30	News Headlines	LS	News
12:31	The First Show (Film: The Judge Steps Out)	RC	Ent
2:00	Million Dollar Matinee (Film)	RC	Ent
2:01	Interview Frank Tallman (9")	LS	Talk
3:39	Interview Francis H. Tuchnan (5 min.)	LS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Maverick (Hostage)	RC	Ent
7:00	Abbott and Costello (Bank Holdup)	RC	Ent
7:30	The Deputy (The Hidden Motive)	RC	Ent
8:00	Million Dollar Movie	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Fort Apache)	RC	Ent
11:49	Clete Roberts News	LC	News
12:07 A.M.	Michael Jackson	LC	Talk
12:38	The Second Show (First Yank Into Tokyo)	RC	Ent
2:05	The Late Feature (Boy With Green Hair)	RC	Ent
3:27	Spectrum (Focus on Am. thru Art)	RS	Ed
3:56	Suspects Wanted	LS	News
3:57	Devotional	LS	Rel
4:01	Sign Off		

Saturday, November 16, 1963

Time	*Title*	*Source*	*Type*
7:55 A.M.	Sign On		
7:55	Devotional	LS	Rel
8:00	From the Group Up (Men, Women and Children)	RS	Ag
8:30	CineMexicano	RC	Ent
10:00	The Saturday Movie (Capt. Sirocco)	RL	Ent
11:30	I Led Three Lives	RC	Ent
12:00 P.M.	Million Dollar Movie (The Ring)	RC	Ent
1:43	Frank Carroll News	LC	News
2:00	Action (Open Clip Action)	RC	Ent
3:18	Bush Country	RC	Ent
3:30	Championship Bowling	RC	Talk
4:30	Sugarfoot (Shepherd With Gun)	RC	Ent
5:30	Bowery Boys (In The Money)	RC	Ent
6:30	The Deputy (Marked For Bounty)	RC	Ent
7:00	Shirley Temple	RC	Ent
8:30	Sat. Night Special (Land of Pharaohs)	RL	Ent
10:30	The Big Show	RL	Ent
12:25 A.M.	Impact (Passage West)	RC	Ent
1:55	Triple Feature (Death of a Scoundrel, Saints Double Trouble and Stromboli)	RC	Ent
6:00	Devotional	LS	Rel
6:04	Sign Off		

95. The amount of time devoted to syndicated or feature film presentations at KHJ-TV during the 1965 composite week is set forth in the table below:

	Hours	*Minutes*
Sunday, May 24, 1964		
Film Time	15	30
Total Broadcast Time	16	16
Monday, February 17, 1964		
Film Time*	14	59
Total Broadcast Time	18	47
Tuesday, April 7, 1964		
Film Time*	14	58
Total Broadcast Time	18	59
Wednesday, March 11, 1964		
Film Time*	15	12
Total Broadcast Time	18	42
Thursday, October 17, 1963		
Film Time*	15	17
Total Broadcast Time	18	26
Friday, June 5, 1964		
Film Time*	16	22
Total Broadcast Time	20	21
Saturday, November 16, 1963		
Film Time	21	23
Total Broadcast Time	22	09
Summary		
Film Time	113	41
Total Broadcast Time	133	40

*Includes one-half of program time for cartoon shows which feature a live master of ceremonies.

96. Of the films presented by KHJ-TV during the composite week, as announced by the Los Angeles Times, 24 were released during the 1950's and 16 in the 1940's and 1930's.

97. With a single exception, the foregoing six paragraphs will serve to present a picture of how KHJ-TV, day-in day-out, and, in-the-overall, has utilized its air time. There is additional evidence in the record covering the station's programming during the week of August 10-16, 1962, the 1964 composite week, the week of October 17-23, 1965, the week of December 23-29, 1966, and the weeks March 31-April 16, 1967. No useful purpose would be served by findings on the additional data. Such a showing would make no appreciable difference in the image of KHJ-TV programming already developed, and would only elongate this perhaps already too long decision.

Crime and Violence

98. The one feature of KHJ-TV's programming that is not adequately covered thus far is the station's practice of presenting movies featuring crime and violence. As one for findings, the subject is not without difficulty. Besides ever recurrent First Amendment problems attendant upon examination of the substantive content of any radio or television programming, there are two schools of thought on the social desirability of television shows featuring crime and violence. One of these schools claims that a diet of such vicarious experience is just what we all need, for it purges us of our innate criminal propensities. The other school simply views such programming as a college

for criminal knowledge. Be that as it may, the record shows that KHJ-TV did show a lot of movies featuring crime and violence, and that an appreciable body of opinion out of the station's audience strongly protested this practice. While to the imaginative the tip of the iceberg under discussion may show through in the 1965 composite week findings made above, the subject warrants amplification and to cover it requires going outside the limits of the 1965 composite week.

99. In a report of the National Association for Better Radio and Television Broadcasting covering KHJ-TV's programming for the week beginning August 10, 1962 (see paragraph 104, infra), the Association included a statistical table. The table reads in its entirety:

*"CRIME STATISTICS**

KHJ-TV's crime statistics for the week included:

Murders	181
'Justifiable' killings	55
Attempted murders	98
Kidnappings	8
Shootings (victims wounded)	19

Additionally there were many instances of extremely brutal beatings, and assorted cases of arson, robbery, false arrests, dynamiting, extortion, and attempted lynching.

*In fairness to the station, we must point out that the claim portrayed statistics reported here are probably substantially higher than they would be for other weeks of programming. Million D Movie ('Jamaica Run' and 'Hell's Island' – nine showings between the two films) is not always crime in its story theme. Also, the 'Baby Face Nelson' promos, which added heavily to the 'murder' statistic can scarcely be typical of promos aired in other weeks."[4]

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[4] "Promo" – promotional announcement, an announcement advertising forthcoming feature.

100. Between July 1, 1963 and December 31, 1963, these movies were shown one or more times over KHJ-TV:

Title	*Times Shown*	*Dates of Showing*
Adventures of Capt. Fabian	2	8/12/63; 11/9/63
All This and Heaven, Too	3	7/25/63; (2) 10/21/63
Androcles and the Lion	2	7/20/63; 12/25/63
Angel Face	2	11/18/63; 12/21/63
Angels With Dirty Faces	3	7/24/63; 12/7/63; 12/2/63
Anna	1	11/1/63
Anna Karenina	1	7/24/63
Anna Lucasta	1	8/10/63
Armored Car Robbery	3	8/31/63; (2) 11/22/63
Baby Face Nelson	1	7/27/63
Bermuda Affair	9	(9) Week of 8/26/63
Best of the Badmen	2	8/24/63; 11/25/63
Big Sleep, The	1	7/31/63
Big Wheel, The	1	10/26/63
Blackbeard the Pirate	1	10/27/63
Black Tuesday	1	9/10/63
Born to be Bad	3	(2) 11/19/63; 12/21/63
Born to Kill	3	7/21/63; 10/11/63; 12/28/63
Bowery to Bagdad	1	12/28/63
Bright Leaf	1	9/27/63
Caught	1	11/17/63
Come Fill the Cup	1	11/17/63
Confidential Agent	1	9/23/63
Damned Don't Cry	1	10/26/63
Destination Murder	1	11/20/63
Eighteen and Anxious	1	8/14/63

Title	*Times Shown*	*Dates of Showing*
Eve of St. Mark, The	1	10/30/63
Female Jungle	2	11/20; 10/19
Fighting Trouble	1	10/19/63
Flesh and the Spur	3	(2) 8/20; 12/14
Flight for Freedom	2	10/7/63
Forbidden Island	1	10/31/63
Forever Amber	1	11/23/63
Fountainhead, The	1	10/11/63
Gambling House	1	12/7/63
Gangster, The	1	10/21/63
Gang-Busters	4	9/3/63; (2) 11/6/63; 12/7/63
Ghost and Mrs. Mires, The	1	9/12/63
Girl in Every Port, The	1	9/28/63
Golden Mistress, The	1	10/3/63
Gun Battle at Monterey	1	8/24/63
Half Breed, The	2	8/19/63; 11/27/63
Hell to Eternity	1	12/7/63
Hells Island	2	(2) 10/30/63
Herod the Great	1	7/20/63
High Sierra	1	9/16/63
Humoresque	1	8/28/63
I, Mobster	1	7/13/63
Impact	1	10/27/63
Indian Fighter, The	9	(9) 10/28/63
Johnny Apollo	2	8/28; 11/10/63
Kiss Before Dying, A	1	7/21/63
Land of the Pharaohs	1	10/16/63
Left Handed Gun, The	1	11/24/63
Letter from an Unknown Woman	1	11/30/63

Title	*Times Shown*	*Dates of Showing*
Look in Any Window	10	(9) week of 8/2/63; 11/25/63
Las Vegas Story	2	(2) 11/21/63
Love in the Afternoon	1	9/22/63
Lure of the Sila	1	10/6/63
Macao	2	7/3/63; 11/30/63
Manhandled	3	8/18/63; (2) 11/12/63
Monkey on My Back	1	9/17/63
Montana Belle	3	8/21/63; (2) 11/27/63
Moulin Rouge	1	10/19/63
My Forbidden Past	11	(9) week of 12/2/63; 11/7/63; 12/8/63
My Gun Is Quick	1	10/2/63
Murder Without Tears	1	8/31/63
New York Confidential	2	8/17/63; 11/1/63
Night of the Hunter, The	2	10/2/63; 12/31/63
Out of the Fog	2	(2) 9/27/63
Outpost to Morocco	2	(2) 9/17/63
Outrage	1	11/29/63
Payment on Demand	1	7/26/63
Private Affairs of Bel Ami, The	1	11/27/63
Problem Girls	1	11/5/63
Quicksand	2	12/6/63
Quiet Gun, The	4	(2) 7/30/63; 10/26/63; 12/6/63
Rancho Notorious	3	7/25/63; 8/23/63; 11/4/63
Red River	1	11/28/63
Return to Paradise	1	10/4/63
99 River Street	2	(2) 9/26/63
Road House	1	12/7/63

Title	*Times Shown*	*Dates of Showing*
13 Rue Madeline	3	(2) 8/9/63; 11/24/63
Ruthless	1	12/7/63
Star, The	1	11/1/63
Susan Slept Here	2	9/5/63; 11/7/63
They Won't Believe Me	1	12/26/63
Things to Come	9	(9) week of 11/18/63
Three Bad Sisters	1	9/6/63
Three Husbands	1	7/15/63
Three Sailors and a Girl	9	(9) week of 9/30/63
Track of the Cat	1	9/24/63
Tuttles of Tahiti	2	(2) 12/24/63
Underground	2	(2) 9/3/63
Valerie	1	7/6/63
While the City Sleeps	2	9/8/63; 12/12/63
Wuthering Heights	1	8/29/63
Yes, My Darling Daughter	2	(2) 7/18/63
Young Guns, The	1	11/18/63

101. "Jack the Ripper" was televised eight times over KHJ-TV during the week of July 6, 1964.. "Pretty Boy Floyd" was presented at 7:30 p.m. on Sunday, July 12, 1964. During the week of September 21, 1964, the "House of Wax" was presented five times at 7:30 p.m., at noon on Saturday, and at 11:30 a.m. and 1:30 p.m. on Sunday.

102. In a press release dated July 30, 1964, the National Association for Better Radio and Television announced that it had prepared a report on crime programs on Los Angeles television stations which was available to the public at the

headquarters of the organization. The report contained synopses of KHJ - TV's representation of "Jack the Ripper" and "Pretty Boy Floyd." Those summaries read as follows:

"JACK THE RIPPER" - featured film televised eight times during the week beginning July 6 (Monday) by KHJ - TV, Channel 9, owned by RKO General, Inc.

Following the opening scenes which portray the stabbing to death of a of a girl in a dark corner of a London street, the station announcer says: "You are about to witness one of the most terrifying films ever produced."

The first murder (and others to follow) was committed by an unidentified sadist who first accosted the victim, choked her until almost unconscious, then stabbed her in the abdomen with a long-bladed knife or scalpel which he takes from his physician's black bag. The murder was portrayed with screams, gasping sounds, and moans. The camera in this scene of murder, as well as those which follow, holds close-up views of the at first terrified and then contorted face. The murder scene is long and drawn out. Close-up on knife blade after it is pulled from the girl's body.

Other incidents of violence, including the attempted mob murder (with a knife) of a young American detective, are followed by another brutal sadistic attack on a barmaid. The camera holds a close-up view of the face of the girl as she is choked and then stabbed (shown in silhoutte) three times.

A surgeon of the "Mercy Hospital for Wonen" examines the body in the street. He plans to do a post-mortem and tells a group: "Let's get this thing out of the street." He laughs. There is further mob violence. In the morgue at the hospital the surgeon's description of the body is this: "Bruises on the neck, Deep-seated multiple abdominal incisions inflicted by someone who knew what he was

doing. These wounds are not the savage slashings of a maniac. They are careful well-defined abdominal incisions that show a knowledge of anatomy and surgery."

There is a long attempted rape sequence in a private room of an unsavory nightclub. The girl escapes after having part of her dress torn off. She runs into the street, where the Ripper accosts her. She is murdered in the same manner as the previous victims. During the break for commercials the announcers says: "Brace yourself for more terrifying moments coming up."

As following sequence covers a mob attack on a mute who is suspected of being the Ripper. (This mute, apparently mentally retarded, is the assistant to the surgeon when he operates.)

Another girl is murdered - sound effects and camera close-up as in the preceding murders.

We now discover the identity of the Ripper. He is the surgeon. He is searching for a girl named Mary Clark, a former prostitute whom he thinks is responsible for the suicide death of his son. He finds Mary Clark and traps her in her room. He murders her in a long, graphic murder scene. Close-up on her face as she is stabbed.

The Ripper murders a guard at the hospital. He stabs the unsuspecting guard. The police come upon the doctor as he is performing an autopsy in the morgue. He attempts to get away, and is trapped in an elevator shaft. The elevator descends slowly to crush his body at the botton of the shaft. He screams, moans, and sweats as the elevator comes down on him. The camera shows the elevator floor.

Blood bubbles up through the cracks in the floor as the Ripper is crushed beneath it.

SUMMATION: The picture shows in graphic picture sound, the details of the murders of five young women. It shows two attempted murders by mob violence. It includes the brutal stabbing of the hospital guard, and the crushing to death of the villain. It portrays terror throughout, in settings which include low-type clubs, the hospital morgue, and dark alleys.

Each of the eight showings during the week were televised at times particularly available to children and youth. The evening telecasts began at eight p. m. The Saturday showing was at noon. The two Sunday telecasts covered the period between 11:30 a. m. and 3:30 p. m. The Saturday showing immediately followed a program specifically addressed to children.

NOTE: The showings were followed by a one-minute filmed promotional "trailer" for the film Pretty Boy Floyd. This trailer illustrated the gang killing, by three men with machine guns, of four police officers and the criminal they were guarding.

"PRETTY BOY FLOYD" - Feature film (one hour 45 minutes) presented Sunday, July 12, 1964, beginning at 7:30 p. m.

This is a film which allegedly depicts the life of the hoodlum killer, Pretty Boy Floyd. It is largely concerned with the graphic presentation of 13 brutal murders, two "justifiable" killings, a number of attempted murders, three robberies, and other incidents of extreme violence.

Near the opening of the picture the wife of man Floyd has viciously beaten wants him (Floyd) to run off with her. SHe says: "Everybody knows about us. Why can't we blow this crummy town."

The wife says: "Mike's going to be gone a whole week." She gives Floyd $262 of Mike's (her husband's) and says: "Just kiss me, Pretty Boy."

Floyd murders a man who has killed his father by burning him to death in a barn in Oklahoma.

Floyd, after being sentenced from 12 to 15 years for his part in a bank robbery, escapes.

Floyd meets a new partner and a woman (Ma Parks) in Kansas City. Two swindlers who live in Ma Park's boarding house, leaving their wives, as Ma Parks says: "to entertain themselves as best they can." When these two characters return they enlist their wives in a plot to turn Floyd over to the police to get the reward money. One of the wives tells Floyd. Floyd and his pal kidnap the two swindlers and execute them gangland style. The two wives run off with Floyd and his partner. They murder a policeman in uniform. Floyd's pal is killed. Hiding out in Oklahoma, Floyd murders a sheriff who finds him. Floyd is wounded. Ma Parks and the wife of the man whom Floyd has murdered take care of him. The girl the girl is pregnant (presumably Floyd is the father).

Ma Parks arranges the massacre of the police guarding a notorious criminal. After this incident in which three gangsters with machine guns murder four officers and their prisoner,

ganster come to Floyd's room (he and a girl are on the bed in his room) and take him off for a gangland trial. Floyd is freed. He flees to Oklahoma.

A woman, the wife of a farmer, helps Floyd, She tells him: "I don't want any money. You can give me a few minutes of relaxation."

Floyd is trapped by the police. He runs, is shot down in an open field, then gets up and staggers. He is shot somemore, finally falls dead.

A good idea of the content of the "House of Wax" may be obtained from the editorial which appeared in "Better Radio and Television," see paragraph 111, infra.

Public Reaction

103. Not all of KHJ - TV's viewing audience finds the station attractive. In the fall of 1964, KHJ - TV, at a cost of $10,000 commissioned Frank N. Magid Associates, a research organization to conduct an in-depth survey to determine the programming opinions of the Los Angeles viewing public toward television stations. The study is long, complex and much of it is devoted to subjects irrelevant here, but some facts are worthy of note. The study is based on analysis of a sampling of 796 Los Angeles residents. Distribution of those 796 persons was based on the variables age, sex income and occupations. Conclusions were drawn from the survey in the areas of news, sports. entertainment, public interest and advertising. In brief,

these were the conclusions of significance here:[5] News (over-all coverage) – less than 1% mentioned KHJ-TV while 34% mentioned the leading station in this category; Spots – although figures were given for other stations and the conclusion was drawn that no station projected a positive image, KHJ - TV was not mentioned; Entertaiment ("all around") - KHJ - TV was mentioned by 3% while 26% mentioned the leading station in this category; Entertainment (best movies) - KHJ - TV was the leader in this category with mention of 19% ("KHJ's movie image is the most positive among viewers of middle socio-economic level and among the younger age group"); Most contribution to community – KHJ-TV not mentioned while 12% mentioned the leading station in this category; Programs of an educational nature -KHJ - TV mentioned by less than 1% mentioned the leading station in this category; Most believable advertising – KHL-TV mentioned by 2% while 8% mentioned the leading station; Channel viewers would want to remain on the air if all others stations ceased – 4% mentioned KHJ-TV while 28% mentioned the leading station in this category.

104. Reports have been prepared for the National Association for Better Radio and Television (NAFBRAT) on the programming of KHJ - TV. One of these includes a factual presentation of the programming of the station during the week beginning Friday, August 10, 1962, and is based primarily on monitoring the station. The report

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5 Not all 796 surveyed responded to all questions. The word "mentioned" as used above connotes responses received and found acceptable for statistical use by Magid. In reading the Magid assessment it might be noted that there are seven VHF commercial television stations in Los Angeles.

is 57 pages long and goes into much detail concerning various facets of KHJ - TV's programming during the week. On the basis of the data analyzed these evaluations were made:

1. The station depends promarily on old theatrical films (mostly re-runs) for its basic program content.

2. There appears to be reasonable doubt concerning the station's active protection of its audience against misleading advertising.

3. The station's news coverage is not sufficient to constitute a significant community service.

The station violates standards established by the broadcasting industry in regards to the time -per -hour and individual length of commercial spot announcements.

5. The station is failing to produce or originate (with the exception of sports programs) telecasts which represent a significant value to the community.

6. There is an unhealthful saturation of crime and violence in the station's entertainment programs.

7. There are significant deficiencies in the station's religious, discussion, and agricultural programs.

105. A similar report to the one above, by the same organization, based on a monitoring of the station for the week March 31-April 6, 1967, found these facts: The station was on air during hours ranging from a high on Sunday, April 2nd of 19 hours 16 minutes to a low on Mon-

day, April 3rd of 15 hours 3 minutes. During the week Theatrical Films were presented 74 hours out of the 121-½ hours the station was on the air. There were 46 showings of 35 different films. Seven films were presented twice, two presented three times. 32-¼ hours were devoted to films over 20 years old. Children's programming carried by the station during the week was comprised of a Monday-Friday, five minute, morning show entitled "Nature's Window"; a TV film rerun, "Timmie and Lassie" carried Monday through Friday at 5:00 p.m.; a TV film rerun, "Superman." Monday through Friday at 5:30 p.m., and "Shrimpenstein," a live show carried Monday through Friday at 6:00 p.m. Religious programs carried during the week consisted of "devotionals" ranging in length from two minutes at sign -on and sign-off, taped, featuring local ministers, and three half hours of recorded religious programs. Other than the "devotionals" no religious program was carried on Sunday. In the field of Agriculture the station presented each morning, Monday through Friday, for ten minutes a program consisting for the most part of two short films distributed by the U.S. Department of Agriculture. Educational programming occupied 5-½ hours during the week. Included was a 30-minute, Monday through Friday, program presented by the Los Angeles City Schools, a program of the California Teachers Association, and several half-hour films produced at the University of Michigan. News -16 programs were aired ranging in length from five minutes to 30 minutes and 13 "headline" reports of one to two minute duration were carried. Total time devoted to news was less than four hours. Fifteen hours and 30 minutes during the week were devoted to Talk programs. Of this time 5-½ hours were devoted to Sports. At 2:30 p.m. Monday through Friday a live program was presented featuring interviews with experts in various fields of Public Affairs. These programs lasted from 50 to 60 minutes each day.

On Sunday evening Mayor Yorty was featured in a 90-minute program of talks with various guests. On Thursday evening there was a rebroadcast of a debate on conservatism between William F. Buckley, Jr. and Mark Davidson. During the week another Buckley program was broadcast, as well as an hour-long show featuring Al Capp.

106. NAFBRAT also issued a survey report entitled "Crime on Television." The report surveyed crime programs televised by Los Angeles VHF stations during the week of June 21-27, 1964. A crime program was defined as a program in which commission of crime was a major theme. War pictures, some spy pictures in which crimes occurred and cartoon programs were excluded from the survey. NAFBRAT disclaimed condemnation of crime programs per se but stated that it vigorously opposed saturations of violence and constant presentations of incidents and motivations likely to induce antisocial behavior. The survey found that during the week June 21-27, 1964, Los Angeles television stations televised a total of 192 hours of crime programs, an increase of almost 20% over the amount the stations broadcast in June 1958. More than two-thirds of these programs were broadcast before 9:00 p.m. KHJ - TV led all other stations with 42 hours devoted to such programs. The next highest stations carried crime programs 33-½ hours.

107. On September 3, 1964, NAFBRAT wrote the FCC complaining of the telecasting by KHF - TV of "Jack the Ripper" and "Pretty Boy Floyd."

108. On September 22, 1964, the United Church Women, Los Angeles Council, wrote NAFBRAT:

"I am enclosing copies of letters sent to the Federal Communications Commission and to the Program Director of KHJ-TV by the Los Angeles Council of United Church Women, in support of your Association's complaint of September 3 against the showing of Jack the Ripper and Pretty Boy Floyd.

"We hope that wnough protests will be made so the eventually we will see a decrease in the amount of violence and horror shown on television."

109. On September 24, 1964, Lionel Van Deerlin, Member of Congress, wrote to KHJ - TV. The body of his letter reads as follows:

"I have just received from an organization known as the National Association for Better Radio and Television an outline and summation of two pictures shown by your station several times during the week at hours when they were particularly available to children. The pictures were Jack the Ripper and Pretty Boy Floyd. I have aslo received a copy of a complaint issued by the National Association for Better Radio and Television to the Federal Communications Commission.

"Speaking not only as a member of the Interstate and Foreign Commerce Committee, but as a father of six children, I considered it incredibly bad taste for your station to

permit the televising of such films at any time, but particularly so at times when they are easily viewable by juveniles. I support wholeheartedly the complaint of the National Association for Better Radio and Television, and will do anything within my power to bring about a greater sense of responsibility to the public on the part of the management of stations such as yours."

110. On October 23, 1964, Congressman Van Deerlin wrote another letter to the station. The body of that letter reads as follows:

"I appreciate the courtesy of your reply to my letter regarding the NAFBRAT complaint concerning films telecast by KHJ - TV. At the same time, I am somewhat appalled at the ingenuosness of your apparent assumption of naivete on my part which would cause me to accept your explanation as having been made in all seriousness.

"The crux of your explanation regarding the films is that since they deal with violent subjects the matter should be expected to contain some violence. To a certain extent this is true, but a man in your position should know that there are acceptable and unacceptable ways of depicting violence. The film, Jack the Ripper, in particular, depicted acts of violence in an unacceptable manner. A description of the first murder is sufficient to explain what I mean:

". . . an unidentified sadist. . . accosted the victim, choked her until almost unconscious, then stabbed her in the abdomen with a long-bladed knife . . . . The murder was portrayed with screams, gasping sounds, and moans. The camera in this scene of murder, as well as those which follow, holds close-up views of the at first terrified and then contorted face. The murder scene is long and drawn out. Close-up on knife blade after it is pulled from the girl's body."

"You cannot believe yourself, or seriously be attempting to make me believe, that such details are necessary in the depiction of historical events. They are obviously inserted for pure shock value, and the attempt on your part to rationalize them as being merely a recital of factual events lacks validity. Such arguments are flimsy in the extreme and denote a somewhat astounding belief on your part that I and presumably other inquirers are lacking in intelligence.

"You state that in your selection of programs you attempt to satisfy a diversity of tastes and interests, I am moved to wonder to what tastes and interests you are pandering in your telecasting of movies such as Jack the Ripper. In short, I find your explanation unacceptable."

111. In the fall issue (1964) of Better Radio and Television (formely NAFBRAT Quarterly) an editorial appeared entitled, "Station Answer: "House of Wax." The editorial reads as follows:

"Seventeen days after the National Association for Better Radio and Television filed a complaint against the management of KHJ - TV for televising the sex-murder film "Jack the Ripper" during daytime and early evening hours, the RKO-General Los Angeles station presented the first of eight showings of "House of Wax" within a seven-day period. Station management could not have devised a more effective expression of its attitude toward the NAFBRAT complaint to the Federal Communications Commission. The implication is loud and clear: KHJ-TV will continue to broadcast lurid, sadistic horror films during "children's hours."

"There is no mistake here. There is no misjudgment of the broadcaster's attitude or intention. "House of Wax" is a viciously brutal film deliberately designed to frighten and horrify its audience. During the week beginning Monday September 21 many thousands of children viewed this picture during its eight showings -five times at 7:30 p.m., at noon on Saturday, and at 11:30 a.m. and 1:30 p.m., on Sunday. KHJ - TV promoted the showings of "House of Wax" in newspaper display ads with this appeal: "The motion picture you have asked to see! NOW! CAN YOU TAKE IT?"

"House of Wax" is a story about a disfigured sculptor who stalks and murders his victims, processes their bodies in boiling wax, and places them in his horror museum. Early in the film minutely realistic life-size was figures are are destroyed in a prolonged fire sequence which shows close-ups on faces and bodies as the wax drips

like flesh in the consuming heat. When the heroine of this epic in sadism discovers that one of the figures in the museum is actually the body of her murdered friend, the mad sculptor straps her in a coffin-like contained below a vat of boiling wax, gives her a hypodermic injection, and whispers: "The end will come quickly, my love."

"There is no mistake here . . . but there is something wrong. Exploitation of depraved tastes. Seven-thirty in the evening! Noon on Saturday! Sunday morning! Is RKO-General really qualified to use public domain Channel 9 within the public interest, convenience, and necessity? F.O."

112. Organizations and Congressmen were not alone in taking a dim view of KHJ - TV's on -the -air operation. As shown in the following subparagraphs, individuals also voiced critical views.

Dr. Clifton E. Moore, Director of the Radio-TV Film Commission for the Southern California Council of Churches, is an ordained minister. In pertinent part he testified that: His organization represents 2,000 churches in Southern California. It assists in providing religious television programming for Los Angeles television stations. He contacted KHJ - TV concerning the presentation of live programs but was told KHJ - TV does not do live church services and does not have facilities or manpower to do live programming. He does furnish KHJ - TV with a filmed program, "Bauman with the Bible," featuring a Washington, D.C., minister. He favors local stations presenting local religious leaders. A program broadcast in the past featuring a local

minister received greater acceptance than "Bauman with the Bible." KHJ-TV's "Insight" program, a nationally distributed program, features a Catholic Priest and is sectarin in part. In his opinion the program would be of greater value if a local priest were featured. Dr. Moore frowns on the Easter and Christmas services presented on KHJ-TV because they are commercially sponsored. In his view one time presentations of sponsored religious programs are not in the public interest.

Dorothy Clayton McKenzie is an associate professor of English at California State College at Los Angeles and teaches literature for young people. She was instrumental in the production of the program called " Concourse." The program was carried for some time over KHJ-TV but was abruptly terminated by the station. Mrs. Mckenzie, on June 1, 1963, wrote the station the following letter:

> "The misinformation which is being sent by your station to viewers who write you to ascertain why Concourse has been discontinued greatly disturbs me. I have a number of calls from persons who regretting the loss of the program, wrote to your station to learn the reason for its discontinuance. All were informed that I had taken ill and did not feel able to continue the series -you also had the temerity to add that you deeply regretted this unforeseen development.
>
> "You well know that your statement is not true and that, since two tapes were already prepared and I had made adequate plans for the preparation of several more, my brief indisposition would not have canceled a single telecast. You also know

that in my final telecast of May 5th I truthfully recounted the reason for cancelation, your insistance that the program be moved to Fridays at 12:00 or 12:30, half-hours during which most viewers interested in this type of program do not have free time. You made the decision, so it is difficult for me to understand your fabrication.

"Your lack of honesty has placed me in a most difficult situation, with viewers who write inquiring as to my health and with guests who had been invited for interviews which had to be cancelled due to the termination of the program. King Vidor had consented to be my next guest, and other distinguished personalities were awaiting word as to available time for tape preparation. I have explained the true situation to all of them; what will they think if they or their friends write your station and receive the fabricated explanation which you for some reason have invented?

"You made things difficult enough while we were participating in the program: the time was not premium. pre-emptions were made with little or no notice, mistakes were made in the order in which the tapes were run without apology and not once did you find time or disposition to make a single comment to me, written or by telephone, good or bad, concerning the program. Now that you have found that public service offerings can be disposed of by relegating them to a time during which few people who are interested in such programs have free

time for viewing, thus serving the dual purpose of making it possible for you to sell all of your weekend time and discouraging public service programs which appeal to a significant number of your viewers, do you think it is fair to inform questioners (I quote from your Mr. Sherwin's letter): 'We are very happy to have had the pleasure of carrying this program, and if it becomes available at some time in the future, we would make every effort to reschedule it'? (The same double talk has been incorporated into a form letter, so apparently you have had enough inquiries to make individual response uneconomical).

"The misinformation which you are dispersing is most discouraging to those of us who are willing to work in the media and are thick-skinned enough to endure the affronts which apparently are the lot of public service programs. Now that you have brought our venture to what you no doubt consider a successful conclusion, do you agree that common courtesy to me and to the College staff demands that you state the true reason when you are asked why Concourse has been discontinued? I sincerely hope that you do – it would require no longer a communication than does your fabrication."

Mrs. McKenzie gave a deposition in this proceeding. Her views concerning the matters covered in the letter have not changed.

Mary Rogers Smith, former coordinator for children in the Los Angeles County library system, author of children's

books, and winner of awards in her field, expressed her opinion of KHJ-TV's programming. "Jack the Ripper," "Pretty Boy Floyd" and "House of Wax" she regarded as unacceptable for children since they deal with violence, murder and glamorize crime. Based on her general viewing of the station, she found very little constructive programming for children and many old movies. Of some 16 syndicated features KHJ-TV presented, when it was not showing movies, eight or nine she considered to be unacceptable for children. "Shrimpenstein" she found offensive to children because of the injection of off-color humor into the program. Old movies she found objectionable for children since such programming preempted time to the exclusion of better material.

Elizabeth Longstreet, radio and television chairman for the 10th District Los Angeles P.T.A. (About 250,000 members), member of an advisory committee on "Head Start," the Economic and Youth Opportunities Organization, and the evaluation committee of NAFBRAT, also expressed her views. As a member of NAFBRAT she examines programming with a view to whether or not programs offered are suitable for children. Is is her opinion that KHJ-TV's programming is "uninspired" and not always "entirely responsible." The majority of the station's time has been used for the showing of motion pictures. She complained to KHJ-TV's manager over the repeated showing by the station of "Jack the Ripper". After a conversation with Klein she came away with the impression that his view of the station's responsibility was that "the station was responsible to maintain a high level of viewers so that they would sell time to their advertisers." Her opinion of "House of Wax" was that it was a terrible and frightening movie and the televising of it during hours children could watch was irresponsible. "Shrimpenstein" she found

to be unsuitable for children' viewing since it is ugly, grotesque and makes fun of daily life in a way children are unequipped to understand. Such shows are detrimental to children since they affect their behavior and thinking.

Margaret O. Pollack, of Fullerton, California, a member of the Board of Trustees of the Fairview State Hospital, and member of the League of Women Voters, testified that the League had conducted a survey of emotionally disturbed children in the Orange County Public Schools in conjuction with California State College at Fullerton. A report of the survey indicated that there were thousands of emotionally disturbed children in the Orange County schools. Substantial authority exists for the proposition that films shown on television, which deal with crime and violence, have a detrimental effect on children. She had found to her consternation that one of her own children had viewed one of KHJ-TV's multi-run movies, "The Last Mile," the tale of a sadistic convict.

Dr. Allan M. Zeltzer is an associate professor of drama at California State at Fullerton, specialist in the analysis of the administration of educational television, teacher of television techniques and producer of programs. He testified that in his opinion KHJ-TV is a "movie station" and weak, as a station, in comparison with other Los Angeles independent television stations. His opinion was that television was moving in the direction of becoming an adjunct to the motion picture industry and that condition interfered with the function of television as a medium. KHJ-TV, he found, offered very little: only token broadcasts of public affairs and cultural programs, a condition he found which did not work for the area, and the community, in public service. In his opinion a good television station should have a provocative editorial policy.

Charlton Heston, stage, film and television actor, and president of the Screen Actors Guild, testified that television in Los Angeles offers no creative stimulus to performers, although two-thirds of the members of the guild's income comes from television, and of those two-thirds, one half comes from work on commercials. The Guild's records show that television is increasingly oriented toward commercialization. Heston notes that television programming merely provides separation between commercials. An independent station could pay actors to appear before its cameras, believes Heston, for many stars like himself would work for minimum scale on a "good" program. This would be particularly true if the program was local, for then the actors' mistakes would escape national attention, Feature films on television he deplores because of the extensive cutting of the films necessary to tailor them for television, and the constant interruption of them to accommodate commercial announcements. In Heston's view television broadcasters have a responsibility to raise the level of taste and quality, He believes programs aired at times that attract child viewers creates responsibility as to content on the part of those who create programs. Violence on television, he believes, is a source of legitimate concern on the part of many people.

Fidelity Television, Inc.

Corporate Structure

113. FIdelity Television, Inc., was incorporated in California on October 8, 1965. The corporation is authorized to issue 100,000 shares of common stock with a par value of $10.00 per share. At the present time, 18 shareholders hold 3,395 issued shares, and 45,105 shares have been subscribed. The officers, directors and stockholders are:

Name and City of Residence (All California)	Office	Number of Shares Held	Number of Shares Subscribed	Percentage of interest
William G. Simon San Marino	President, Director	700	9,300	20.62
George R. Johnson Long Beach	Vice-Pres., Director	175	2,325	5.16
Walter B. Chaffee Fullerton	Secretary, Director	350	4,650	10.31
Nello C. Di Corpo Downey	Treasurer Director	70	930	2.06
Henry Duque Los Angeles	Director	350	4,650	10.31
Emmett H. Jones Los Angeles	Director	350	4,650	10.31
Mervyn LeRoy Los Angeles	Director	350	4,650	10.31
Louis J. Cella, Jr. Santa Ana	-	350	4,650	10.31
Phillip S. Twombly Fullerton	-	105	1,395	3.09
William B. Dugan San Francisco	-	70	930	2.06
John B. Lawson South Laguna	-	70	930	2.06
Emmett C. McGaughey Los Angeles	-	70	930	2.06
Edward M. Medvene Encino	-	70	930	2.06
Richard A. Murphy Pasadena	-	70	930	2,06
Edward L. Olsen South Laguna	-	35	465	1.03

Name and City of Residence (All California)	Office	Number of Shares Held	Number of Shares Subscribed	Percentage of interest
Anthony I. Owen Beverly Hills	-	70	930	2.06
Thomas R. Sheridan North Hollywood	-	70	930	2.06
Alexander Tucker West Los Angeles	-	70	930	2.06

Diversification of the Media of Mass Communication

114. None of Fidelity Television's stockholders has any connection with any broadcast station, newspaper, or motion picture theater. One stockholder does have an interest in a CATV system.

Integration of Ownership into Management

115. Set forth below is a list of the stockholders who plan to participate in the operation of the station should Fidelity receive the license here at issue, together with the job they would hold, and the amount of time they would devote to the job.

William G. Simon	General Manager	Full time
Nello C. Di Corpo	Director of Public Service Programming	Full time
Phillip S. Twombley	Community Relations Coordinator	20 hours a week
Emmett C. McGaughey	Public Relations Coordinator	10 hours a week
William B. Dugan	Sales Coordinator	15 hours a week
Louis J. Cella	Health and Medical Program Coordinator	5 hours a week

Thomas R. Sheridan	Discussion Program Coordinator	5 hours a week
George R. Johnson	Educational Program Coordinator	10 hours a week
Edward L. Olsen	Senior Citizens Program Coordinator	5 hours a week
Walter B. Chaffee	General Counsel	15 hours a week

Finance Committee

Walter B. Dugan, Chairman
Henry Duque
Emmett H. Jones

Creative Program Committee

Mervyn LeRoy, Chairman
Anthony I. Owen
Alexander Tucker

Biographical Sketches

116. In the following subparagraphs biografical data on the Fidelity stockholders is set forth:

William G. Simon (President, Director and 20.62% stockholder) was born April 17, 1913, at Douglas, Arizona. He attended Mt. St. Mary's College, California where he graduated cum laude, and the University of California at Berkeley where he received an LL.B degree in 1940. From 1940 to 1964 he was a member of the Federal Bureau of Investigation. His residence in the Los Angeles area began in March 1960 when he became Special Agent in Charge of the Los Angeles Division of the FBI, which includes about one-half of California and about 11,000,000 population. In March of 1964 he retired from the

Bureau and was honored at several testimonial dinners. Since leaving the FBI, he has engaged in the practice of law in the Los Angeles area and is in the same firm as Medvene, Murphy and Sheridan. He is also a salaried official of Leisure World Foundation, an organization engaged in the promotion and management of housing and recreational communities. In 1936 he had a radio show over a San Francisco station, a weekly book review program called "Contemporary Authors." While with the FBI he gave about 400 talks on citizenship and law enforcement to numerous civic groups. Since retriment from the Bureau he has continued to give these talks. When he was with the Bureau he belonged to several law enforcement organizations. In 1962-63 he served on the advisory council of Immaculate Heart College. He is a member of the Regents' Council of Mount St. Mary's College. In 1965 he participated in a seminar at Princeton on "Leisure." He has been honored by St. Mary's College for his work in community affairs. He is a trustee of the J. Edgar Hoover Foundation, a member of the California State and the U.S. Supreme Court Bars, the Wilshire Bar Association, the Los Angeles Club and the One Hundred Club. He has been a Deputy Grand Knights of Columbus, a member of the Holy Name Society, he served on a panel during a Senior Citizens Day celebration at the Los Angeles City Hall, and has received a Mayor's Certificate of Appreciation for service to the City of Los Angeles. He speaks Spanish and has contacts in American-Mexican communities.

George R. Johnson (Vice President, Director, and 5.16% stockholders) was born March 19, 1917, in Price, Utah. His family moved to Long Beach California, in 1920. He attended Long Beach public schools and is a graduate of the University of California, B.A., LL.B. He is a member of the California Bar. With the exception of about three years as Special Agent for the FBI (1942-1945) and one year in the San Francisco area

(1945-1946), he has been a resident and lawyer in the Los Angeles-Orange area since 1940. Since January 1949, his office has been located in Long Beach. He is a member of the American Bar Association, Los Angeles County Bar Association, and Long Beach Bar Association, and has been active in Bar Association affairs. He is a member of the Chamber of Commerce of the United States, Los Angeles Chamber of Commerce, and Long Beach Chamber of Commerce, and has been active in Chamber of Commerce affairs. He is also a member of the Board of Trustees of the Memorial Hospital of Long Beach, the Board of Directors of the Better Business Bureau of Long Beach and a member of the Long Beach Council of the Navy League of the United States. He is a Trustee and Treasurer of Republican Associates in Los Angeles County, was a member of the Republican County Central Committee for Los Angeles County, and is a member of the Executive Committee and of the Budget and Expenditures Committee of the United Republican Finance Committee of Los Angeles. He is a Director of the Long Beach Legal Aid Foundation, Secretary and member of the Executive Committee of the Citizens Advisory Council on Public Transportation, a member and former director of the Kiwanis Club of Long Beach, a member of Phi Delta Phi Legal Fraternity, and of the Society of Former Special Agents of the Federal Bureau of Investigation.

Walter B. Chaffee (Secretary, Director, and 10.3% stockholder) was born on October 3, 1915, in Garden Grove, California. He attended elementary and high school in Garden Grove, the University of California at Berkeley, and the University of California Law School. He practiced law in California, and was law clerk to Justice William O. Douglas of the Supreme Court. He has served as City Attorney of Fullerton and as Municipal Court Judge. He is now engaged in private practice in Fullerton. He is a member of the First Methodist Church of Fullerton and

has served on several of its boards, including a term as Chairman of the Board. He helped organize the North Orange County Hospital Building Association, an organization instrumental in promoting construction of a hospital. He has been a trustee of a Hospital in Costa Mesa. He is a member of the Moose Lodge, is a director and past president of the Fullerton Boys' Club, a director and past president of the Family Service Association of Orange County, and a member of the Navy League. He has also been active in the local United Fund and in the Boy Scouts and YMCA, is a director of Friends of the University of California, Irvine, and a director of the Fullerton Junior College Foundation. Since 1949 he has served as Appeal Agent for a Local Selective Service Board. He is past president of the Orange County Bar Association, a member of the California Committee of Bar Examiners and of various State Bar Committees. He is past president of the 34th Congressional District Organization of Business and Professional Men and is president of the Orange County Democratic League. In 1962 he served as chairman of the Orange County Democratic Central Committee. He is a member of the California Non-Partisan Voter Registration Committee. He serves on the board of directors of the County National Bank in Orange, Occidental Savings and Loan Association in Stanton, and Founders Life Insurance Company in Orange.

Nello C. Di Corpo (Treasurer, Director and 2.06% stockholder) was born in Huntington Park, California, on May 3, 1931. He attended elementary school, high school and college in Southern California. From 1953 to 1959, he was Chairman of the Business Education Department of a school district. Since 1959 he has been employed by Cerritos College, Norwalk. He started as an instructor and supervisor of various activites at the College. Since 1963 he has been Dean of Community Services. This position encompasses a wide range of community related

activities, including the following: coordination of community events; contact maintenance with community groups such as League of Women Voters, jevenile authorities, Attorney General's office on crime prevention, Southeast Recreation District, Department of Employment, and Los Angeles Music Center. He has helped set up workshops, seminars, clinics, institutes and special lectures to bring cultural programs to the campus. He has helped in preparing Community Services budgets, the maintenance of records and reports pertaining to educational services, assisted in preparation of a community calendar, worked with the executive secretaries of the Business and Recreation Citizens Advisory Committees, coordinated the Speakers' Bureau, supervised the Art Gallery program, and worked with all the divisions in coordinating seminars, workshops, clinics and youth leadership conferences. He has also served as Executive Secretary of various advisory committees, a job requiring cooperation with community leaders. He has been a PTA officer and has attended a youth conference.

Henry O. Duque (Director and 10.31% stockholder) was born in Los Angeles on July 4, 1904, and has lived there almost all of his life. He has an LL.B. degree from Harvard, and in engaged in the practice of law. He is also a director of the Union Bank of Los Angeles, Sequoia Forest Industries, Inc., and Charles Luckman Associates. He has long been active in a variety of community activities. During World War II, he moved to San Francisco to accept the post of Director of Civil Defense, Northern Sector -a dollar-a -year job. To serve in this post he gave up his law practice. From 1939 to 1946 he was a Director in the American Red Cross. He served for 6 years as President of the Los Angeles Police Commission. He was a founder and the first President of the Los Angeles Music Center and also a founder and first President of the Los Angeles Club. He served as Director and Secretary of the Civic Auditorium and

Music Center Association of Los Angeles. He has been a member of the Board of Directors of the San Francisco Opera since 1955. He has alse served as President and Chairman of the Los Angeles Symphony Association. He served as a Director of the Los Angeles Chamber of Commerce. Since 1946 he has been Chairman of the "Greater Los Angeles Plans," an organization devoted to planning civic and cultural improvements for Los Angeles. He was an organizer and First President of the One Hundred Club of Los Angeles. He has been a Trustee of Harvey Mudd College since 1956. He has been a trustee of the Leisure World Foundation since it was organized in 1964. He holds membership in the American and Los Angeles Bar Association and the State Bar of California.

Emmett H. Jones (Director and 10.31% stockholder) was born in Denver, Colorado, on November 24, 1901. His family moved to Los Angeles in 1914. He attended high school in Southern California and was a student at the University of California. He is President and Director of the Industrial Engineering and Equipment Corporation, Los Angeles, and holds offices and interests in oil producing and refining companies and other enterprises in the Los Angeles-Orange area. He maintains residences in Los Angeles and Laguna Beach (Orange County). He is a member of the Los Angeles Chamber of Commerce, the Los Angeles Electric Club, the Petroleum Club, the Independent Oil and Gas Producers Association, the Association of Drilling Contractors. and the Western Oil and Gas Association.

Mervyn LeRoy (Director and 10.31% stockholder) was born in San Francisco, California, in 1900. He was a vaudeville performer in his youth, and later became a director of motion picture films. He has been a resident of the Los Angeles area since the 1920's and currently resides in Beverly Hills. His name has appeared on a long list of popular screen successes, both as producer and director. He has had 20 pictures play Radio City Music Hall, an all -time record for anu Producer-Director. He has worked with many of Hollywood's most distinguished performers. He now produces motion pictures in association with Universal Pictures Company. He once staged a homecoming for Generals Doolittle and Patton during World War II, which was attended by 175,000 people, the largest crowd ever assembled in the Los Angeles Coliseum. In recognition of his services to the Office of Inter-American Affairs, he was awarded the War Service Certificate by the Coordinator and Director of Inter-American Affairs. He is serving his sixteenth year as President of Hollywood Park Turf Club and is a trustee of the Racing Museum at Saratoga, New York. He was the first President of the Show Business Shrine Club, is a member of the California Museum of Science and Industry, and is a member of the Hollywood Motion Picture and TV Museum Commission. He has been Abbott of the Friars Club of California and has been honored by B'nai B'rith as "The Man Of The Year." He received many awards for his work in the movie industry and is on the Board of Governors of the Academy of Motion Picture Arts and Sciences. He is a member of the Board of Regents of Loyola University in Los Angeles, and is a Regent of St. John's Hospital in Santa Monica. He claims a consierable familiarity with the communities that lie south of Los Angeles and their problems.

Louis J. Cella, Jr. lives in Orange County. A prominent surgeon, and director of a clinic in Santa Ana, he belongs to a number of professional organizations and is active in civic affairs. *Phillip S. Twombly* is a lifelong resident of

Orange County. For several years he was Vice President and General Manager of Blue Growers, Inc., a major grower and marketer of fresh fruits and vegetables. He has a distinguished record of contributions to agriculture at both the local and national levels and is also active in local civic affairs. He is a 10% stockholder, officer and director of Pala Mesa Cablevision, Inc., operator of a CATV system at Fallbrook, California, serving about 400 subscribers. *William B. Dugan* is a longtime resident of Los Angeles. He recently moved to San Francisco. He is in advertising and merchandising. *John B. Lawson* is Vice President of Philco-Ford and General Manager of its Aeronutronic Division at Newport Beach. He has lived in the Los Angeles area since 1961 and has distiguished record of participation and contributions both in business and civic affairs. *Emmett C. McGaughey* has lived in the Los Angeles area for 35 years. He is Vice President of an advertising agency. An ex-FBI agent and former police commissioner, he has a long record of substantial activity in community, welfare and service organization affairs. *Edward M. Medvene* has lived in Los Angeles since 1960 and practices law there in a firm with Simon, Murphy and Sheridan. He is active in YMCA work and assists the American Civil Liberties Union in its litigation. *Richard A. Murphy* is forty years old and has lived in Los Angeles since he was twelve. He practices law in Los Angeles with Simon, Medvene and Sheridan. He participates in the affairs of a number of professional organizations. *Edward L. Olsen* has lived in Los Angeles for 13 years. He has a law degree and is an ex-FBI agent and is now President of the Leisure World Foundation. He participates in a number of civic activities. *Anthony I. Owen* has been a resident of the Los Angeles area since World War II. He is president of a television program production company and is also active in motion picture projects. He

has received commendation from United Community Campaign of America and is on the board of trustees of a hearing research foundation. He has received citations for his professional achievements. *Thomas R. Sheridan* has resided in Los Angeles since 1953. He is a lawyer and practices in the same firm as Simon, Medvene and Murphy. He has occupied several conspicuous positions in the field of law. He is active in civic and governmental organizations. *Alexander Trucker* has resided in Los Angeles County since 1944, has a law degree, operates a citrus grove, and is an officer in a number of motion picture and television production companies. He belongs to a Chamber of Commerce and has participated in charity and relief activities.

Motivational Factors Behind the Filing of the Fidelity Application

117. Eleven television channels are allocated to Los Angeles. Los Angeles has about 3,000,000 population. Over 4,000,000 people reside outside the city but in the same general area. The proximate area with the greatest growth lies south and east of Los Angeles. In that direction lies Orange County with a population of over two and a half million. Orange County is recognized by the Census Bureau as a metropolitan statistical area separate and distinct from Los Angeles. By their very nature Los Angeles television stations are oriented in the direction of the "big" advertiser. A survey made on behalf of Fidelity involving 6,000 telephone calls, letters to 1,200 community leaders, and meetings with leaders in the field of education, government, commerce and cultural affairs gave Fidelity grounds for concluding that KHJ-TV of all the television stations

serving the area was doing the least in the way of public service, that most of its programming was composed of old feature films and cartoons, and that there were many complaints against the station for excessive commercialism. Fidelity also read the Commission's Policy Statement on Comparative Broadcast Hearings with particular emphasis on the statements there concerning two cardinal Commission policies: (1) achiev- service in the public interest because to do so would curtail financial return to the injury of their investors. Moreover, Fidelity noted, conglomerates are inherently incapable of ownership being integrated into day-to-day station operations. As a final conclusion Fidelity decided that KHJ-TV was the antithesis of a public interest operation.

Location of Station and Use of RKO Equipment

118. Fidelity proposes to have its main studio in Norwalk, Los Angeles County, a city with a population of 88,856 located 15 miles southeast of Los Angeles. It also proposes to have an auxiliary studio in Anaheim, Orange County, a city with population of 104,184. It conceives that these facilities will serve as local outlets for what it calls the "Southland," an amorphous area lying to the south and east of Los Angeles which includes Orange County.

119. In one of its exhibits Fidelity states:

> "Should Fidelity be the successful applicant in this proceeding, it would contemplate negotiating in good faith with RKO General, Inc., for the purchase of such of its equipment and facilities, presently utilized incident to the current operation on Channel 9, as may be adaptable to Fidelity's proposed operation."

Need for the Proposed Station

120. Several witnesses gave testimony indicating a need for a television station to serve in the "Southland Area". Brief digests of their testimony are set forth in the next 20 subparagraphs.

Leland E. Oliver, an advertising and public relations man with offices in Orange County, believes Orange County is indeed a separate metropolitan area from Los Angeles. That fact is demonstrated, he points out, by the fact that about 85% of Orange County residents work in Orange County.

Dr. Daniel G. Aldrich, Jr., Chancellor of the University of California at Irvine (Orange County), stated that his school has never been approached by any Los Angeles television station and asked how a station might serve his school or the community. In business, cultural and educational resources, he feels Orange County is a separate area from Los Angeles. He feels Los Angeles television stations have little identification with Orange County in that advertisers, sponsors and personalities are from Los Angeles. In his view Southern California television stations are "faceless" in that they are not aimed toward a particular community interest and are not particularly sensitive to local need.

General S. Jacobs, a long time resident of Long Beach (population 370,000), active in a number of civic organizations there and President of the Board of Education,

stated that although Long Beach, during the past few years, had a number of important problems to cope with, to his knowledge no coverage was given those problems by Los Angeles television stations. He has no knowledge of any television programs that devote time to long Beach public affairs on a regular basis. In his view Long Beach residents are not primarily interested in Los Angeles news and feel they have been neglected and relegated to second place.

William J. Mooney, Chief of Police of Long Beach and active in civic affairs there, stated that Los Angeles television channels gave practically no news coverage to the Law enforcement and civic activities of Long Beach. Programs of his department such as "Lock Your Car," "Stamp Out Crime," and "Law Enforcement on Display," designed to elicit citizen cooperation with the police, received no such coverage. In his view residents of Long Beach consider themselves a separate community from Los Angeles.

Gene M. Bishop, Division Manager of Insurance Securities Trust Fund & Life Insurance Company of California, and President of Long Beach Chamber of Commerce, testified that Long Beach is a major industrial area with fine harbor facilities. Long Beach residents consider themselves separate from Los Angeles, and have independent cultural and educational identity. In his opinion television could be a great help to Long Beach. A local "Job Fair," designed to provide employment information to the needy, would have assisted many more people if television coverage had been available. To his knowledge, important problems pertaining to ownership rights in oil deposits over the past three to four years have received little coverage on television, and no television station has contacted the Chamber of Commerce to inquire how it may help.

William H. Hirstein, a member of the Board of Supervisors of Orange County, California, for twelve years, testified that he and the other members of the Board signed an affidavit which stated that community service programs such as those that had been outlined to him by Fidelity were not being broadcast in the Orange County area; that there is a need for these types of programs; that Orange County is an area with over 1,200,000 inhabitants with no television outlet; and that it is distressing not to be able to effectively communicate the needs of this fast growing county.

Cecil Hicks, District Attorney of Orange County, testified that his office has responsibility for prosecution of all felony cases that arise in Orange County, and in all but five or six cities his office also prosecutes misdemeanors. To his knowledge, the only television coverage his office receives is one newsman from Channel 2, who covers the courthouse area. He has not been contacted by any of the Los Angeles television station to ascertain what public service programming may be benefical to the District Attorney's office, or the community at large.

Mary Michaelyn Schultz, organizer of the Arts Colony of La Mirada, California, active in community affairs of La Mirada for a number of years, and present member of the Cerritos Fine Arts Associates, stated that at various times the organization she has worked with have attempted to obtain television publicity or coverage of special events, such as an "Arts and Cultural Festival" and a program called "Culture at the Grass Roots." However, they were unsuccessful. She attended a meeting at Cerritos College where representatives of Fidelity Television, Inc. met with some 50 community leaders. At this meeting a question and answer session was held to determine how Fidelity

could serve them, and what they wanted to see on Fidelity's public service programs. No Los Angeles television stations has ever contacted her to ascertain the needs of her community.

Dr. Charlotte Frances Stevenson, Supervisor of Music of the Bellflower Unified School District since 1946, member of many professional societies, and active in community affairs, testified that a recent international music symposium, "Creativity and Participation in Music Education," was recently held in Bellflower, California, near Los Angeles. People from all over the United States attended the symposium. There was no television coverage of this event even though coverage was solicited by members of the organization. In her opinion, there is not adequate opportunity on Los Angeles television for musical education programs. There is, however, a great deal of local talent available. She represented her school district at a meeting of community leaders held by Fidelity Television, Inc., at Cerritos College, where there was discussion as to how Fidelity could serve the area. To her knowledge no television station had ever sought out expressions from her community. There is little television coverage of the events in her community.

Reverend Herman Mees Mayer, Senior Pastor, First Lutheran Church, Fullerton, California, and associated with the church for 15 years, testified that there is a need for members of a community to have a sense of identification. In his 15 years in Orange County, none of the Los Angeles television stations has ever contacted him. No television air time has been made available for exposure of Orange County religious matters to his knowledge. In his opinion, there has been less opportunity for religious televison programming in the

Los Angeles area than in any other section of the country in which he has served.

Reverend Kenneth A. Stewart, President of Pacific Christian College and a resident of Long Beach, California, testified that the college presents musical festivals, programs and choral productions but has never been approached by a Los Angeles television station for the purpose of presenting a program. The school would be very interested in television exposure, and feels capable of supplying the performers for such programs.

John Laurence Barrett, Secretary-Treasurer of Buffums Department Store, with branches in Long Beach, Long Beach Marina, Santa Ana, Pomona, Palos Verdes and Lakewood, testified that he is active in the Long Beach Chamber of Commerce, Better Business Bureau, the United Way and the Long Beach Community Chest. The Better Business Bureau's function is to disseminate information to the public in order to protect them from unethical businessmen. To his knowledge, no Los Angeles television station has ever approached the organization to determine what they could do to aid it. Excluding some spot announcements the same is true of the United Way, in which he has been active.

Calvin C. Brack, Secretary-Treasurer of Brack Enterprises, Incorporated, a resident of Orange County since 1955, Mayor of Westminster, California from 1961-1964, and former member of the West Orange County Water Board, participated in the decentralization of Orange County, and a water bond issue in Westminster. There was no television coverage of these projects and none was offered by Los Angeles television stations.

Joyce Susan Vivian Brenner, a resident of Santa Ana, California, voice teacher, and Chairman of the Educational Programming Committee of the Charles W. Bowers Memorial Museum Foundation in Orange County, testified that the museum offers lectures, concerts and other cultural events. It also has an archeological society and a county historical society. She was once employed in television as a staff member of NBC. Based on her past experience in television, and present work with the Bowers Museum, it is her opinion that there has been no separate cultural image of Orange County established by the Los Angeles television stations, even though there is a wealth of cultural events taking place there. There has been no television exposure of these many events. She has never been contacted by any Los Angeles television station to determine programs of the museum available for broadcasting. In her opinion, the programming of KHJ-TV is not stimulating since viewing films 10 to 20 years old is not very challenging.

Galal Joseph Kernahan, a resident of Anaheim, California, and Executive Secretary of the Garden Grove Education Association, testified that Arnold Pike, coordinator of radio and television for the Southern California Teachers Association, and producer of "Dateline Campus", aired on KHJ-TV, visits Orange County infrequently. In his opinion, Los Angeles television stations are interested primarily in the Los Angeles area, especially in respect to newsworthy events.

Roland E. Bigonger, a resident of Yorba Linda, California, Orange County, an attorney, and active in civic affairs, testified that he has been a resident of Orange County for 35 years, and that there are many civic events of interest which have taken place in Orange County throughout this time. In his opinion, Orange County is a separate community with separate interests. He ran for political office in 1966, but was offered no television time. In his view Los Angeles television stations broadcast few newsworthy events involving Orange County.

E. Frederick Bien, City Administrator of the City of Norwalk, California, in Orange County, testified that Norwalk is one of the "Southeast" communities which lie southeast of Los Angeles. The only sources of focal information concerning Norwalk are throw-away newspapers. The only television coverage they have received has been limited to some spot promotions when the city dedicated its new City Hall about two years ago, and to his knowledge, there has been no television exposure by way of a program devoted to public affairs within the area. He feels there is a great need to develop public awareness of the importance of local goverment through the dissemination of information to the people, and that television is the best practicable way to do it. In his opinion, Norwalk is not a suburb of Los Angeles.

John H. Corcoran is a resident of Artesia, California, and manager of the Cerritos Chamber of Commerce. Cerritos is about 12 miles from downtown Los Angeles. His community gets no television coverage unless they come up with something spectacular. In his opinion there is a definite need for television coverage in the "Southland" communities. At present about the only means of communication are "throw away" newspapers. School bond elections have poor turnouts because there is no means of getting messages concerning them across to the public. He has no knowledge of any Los Angeles station ever making effort to determine service area needs. KHJ-TV, in his opinion, primarily shows old movies. He feels television should be better utiiized. Local events such as "Pan American Fes-

tival" involving Lakewood, Norwalk and their sister cities in Mexico received no television coverage. Area such as the one he lives and works in are acquiring cultural facilities. Communications would help facilities their development. The Hollywood Bowl, the Music Center and the Sports Arena get real coverage. Some of the people who attend those places might come to the "Southland Area" if they knew what was going on.

Dr. Allen M. Zeltzer, an Associate Professor of Drama at the California State College at Fullerton, testified that the residents of Orange County have their own cultural events, educational events, fairs, schools, and governments, which give the County a separate identity from Los Angeles. The people in Orange County consider themselves independent of Los Angeles County, and the City of Los Angeles. There is a great wealth of local talent in Orange County which could be used for television programming. In his view there is an advantage to local ownership of a broadcast facility because under such aegis it can provide more public service programming. Los Angeles television stations do not provide an outlet for Orange County expression.

Margaret O. Pollack, a resident of Fullerton, California, member of the Board of Trustees of Fairview State Hospital, and a member of the League of Woman Voters, testified that Orange County has a separate identity from Los Angeles, and television coverage does not give expression to the County's community needs. To her knowledge, no Los Angeles television station has contacted the League of Women Voters of Orange County to determine their needs, even though the organization's purpose is primarily public affairs.

Program Proposal

121. The record contains no facts on how Fidelity would program its station (see paragraphs 3, 6, 8, 10, 11, 13, 15, 18, 19 and 20 of the Preliminary Statement).

Findings of Fact
(Second Phase of Hearing)

Trade Practices of General Tire and Involvement of KHJ-TV

How the Subject Got into Hearing

122. The mechanics of how the above subject got into hearing, and the limitation placed on the issue, are described in paragraphs 10, 12, 14-16, 18-20, above. As a further preliminary to the findings which follow, it might be well to point out why the headnoted subject is in issue.

123. There is an old saw to the effect that a backwoods mother was notified by a horrified witness that one of her children had just been eaten by an alligator. According to the tale, her only response was that she had been telling her husband that *something* had been getting their children.

124. The media of exchange in the market place of broadcasting now takes several forms. Programs are not usually sold for individual sponsorship. Something called a "participating spot announcement" is the station's main product. These announcements are items of commercial matter carried in batches before and after bits of program material in the expectation that viewer interest in what has gone before and what promises to come after will render the viewer sufficiently quiescent to permit the flow of the commercial matter to wash across his mind. The product is sold in a variety of ways. To national advertisers and Madison Avenue it is sold on the basis of a station "rate card" by specialists in the field who are quartered in those large metropolitan areas where the purchasers are located. These specialists represent large groups of stations, sell millions of dollars worth of advertising time, and are remunerated on a gross-volume-percentage-of-sales basis. Local advertising and regional

advertising are for the most part vended by salesmen attached to local stations. These agents, too, employ rate cards and are remunerated on a percentage-of-sales basis. Commercial announcements are also the medium of exchange in "trade deals." These transactions usually involve the direct exchange by the station of blocks of spot announcements to some purveyor of goods or services, or his agent. The station product is traded for various kinds of goods and services ranging in value from a meal ticket to a luxury car or a trip to Europe. Such transactions, needless to say, are usually the prerogative of ownership or top management. Finally, spot announcements are also disposed of through "Barter Houses." These establishments, in composition, resemble both a "Swap 'n Shop" and a bank. They are in the business of acquiring from the stations, for the same kind of consideration involved in "trade deals," such time as the station has the temerity to allocate to purely commercial matter not otherwise sold or traded. The announcement time thus acquired, the "Barter Houses" sell off piecemeal to advertisers at a fraction of the consideration the announcements would otherwise command.

125. On the basis of pleadings filed by Fidelity with the Examiner, it was his judgment that not only was there a reasonable basis to believe that some of the sales practices through which KHJ-TV disposed of advertising time might not only provide facts germane to the central issue here, but they also might well disclose a sales practice not previously identified but one that, nevertheless, might be illuminative of the purposes for which this nation's broadcast time is being used. The pleadings suggested that at least some purchasers of KHJ-TV's advertising were not buying time primarily for the sake of buying time, but rather to keep General Tire and Rubber happy. Now the span of a broadcast day is a measurable concept. The constant inroads made by advertising time on programming, during a broadcast day, are

ever present happenings, plain for all to see. It seemed to the Examiner that if, in addition to the forces of attrition against programming already described, there was another such impetus, it should be identified, if for no other reason than to insure that the public and its representatives were not placed in the position of the mother in the story who, through ignorance, was only cognizant that something important to her was disappearing.

Some Background Facts on How Trade Relations Works at General Tire

126. The disposition and acquisition of products and services are not all processed through conventional sales and procurement channels at General Tire and its subsidiaries. That is to say that products and services bought and sold by General Tire and subsidiaries are not exclusively handled by procurement or sales personnel. For example, in an effort to cut costs at its synthetic rubber plant in Marion, Ohio, an arrangement was made whereby Olin-Mathieson, one of several firms that furnished a product called "polyol" used in the synthetic rubber process at Marion, was given a fixed percentage of the plant's "polyol" business. This arrangement resulted in the reduction of sales by other suppliers of the product to the plant. General Tire's Director of Purchasing asserted that he had no knowledge of the terms of the agreement but had merely been notified by "management" to procure "polyol" primarily from Olin-Mathieson. As will be seen later, the record is replete with evidence of sales efforts made by General Tire personnel who are not affiliated with what would ordinarily be considered a company's sales staff. The record is also full of evidence that sales and purchases carried on outside of normal channels involve contemplation, by both General Tire and those with whom they negotiate, of the purchases and sales made by both, from

each other. Numerous witnesses testified that the theme of trade relations was "you buy from me, I buy from you." Evidence here further makes clear that numerous persons bearing a variety of titles are employed by General Tire and its subsidiaries to contribute to such negotiations as those described above, that these negotiations bear fruit, and that RKO and KHJ-TV are frequently either involved in, or are the beneficiaries of, such negotiations.

127. In the parlance of the trade these extraordinary negotiations are conducted under the rubric "trade relations." As far as this record is concerned the key figure in this field was John G. Ragsdale, General Tire's Director of Trade Relations from 1961 to 1966. Among others involved in "trade relations" were James B. Filson, Ragsdale's West Coast Assistant; G. Lawrence Murphy, Jr., Ragsdale's Assistant in Akron; Robert E. Wilke, Director of Corporate Relations for RKO; Harry Trenner, RKO's West Coast Division Director; Donald Quinn, Director of National Sales for RKO; and Sam Slate, Vice President of RKO.

128. Ragsdale, when he took over the trade relations position, set up files on all companies that traded with General Tire and its subsidiaries either as buyers or sellers, as well as files on any company not thus qualified but listed in Fortune Magazine's roll of top U.S. corporations. Ragsdale's files contained data on the amount of business consummated annually between the subject company and General Tire and its affiliates, a list of persons at the subject company that might be contacted for a trade relations approach, and a running summary of the current state of affairs between the subject company and General Tire and its affiliates.

Trade Relations Practices in Action

129. In an effort to show that the trade relations practices of General Tire at KHJ-TV rendered a disservice to the public interest, Fidelity, who it is to be remembered alone carried the burden of proof on the subject, introduced into evidence facts concerning a number of specific instances of trade relations practices between the General Tire complex and several of the companies with whom it dealt. These facts are here digested and set forth in the paragraphs which follow under the name of the company with whom General Tire carried on the negotiations.

Aluminum Company of America

130. On January 4, 1962, Wilke wrote the Director of Trade Relations of Alcoa referring to a prior telephone conversation, forwarding a list of RKO broadcast facilities, noting that advertising negotiations were coming up, expressing gratitude for cooperation, and expressing expectation of continued beneficial association between General Tire and Alcoa. On the same date he wrote an inter-office memorandum saying that he had discussed with an Alcoa official the association between Alcoa and General Tire, including help on upcoming Boston radio business, and had obtained a promise that the official would go to bat with Alcoa's advertising department. Optimism was expressed that the Alcoa official's intervention would aid RKO's sales efforts with Alcoa's advertising agency. On January 29, 1962 a General Manager for Field Sales for Alcoa wrote to Wilke reporting that he had put in a good word with Alcoa's advertising people on behalf of RKO's Boston station but found that Alcoa felt that it should stay with another Boston station, WHDH, because of prior successful experience there and the superiority of WHDH for Alcoa's purposes. Regret was ex-

pressed for the negative report and assurance was furnished of favorable consideration being given other RKO stations when they could fit into Alcoa's programming. On March 12, 1962 Wilke wrote Ragsdale forwarding a tabulation of the amount of business RKO stations received from General Tire's leading suppliers from October 1, 1960 to September 30, 1961. The list had been compiled by RKO sales. Wilke advanced the opinion that the figures were on the short side, noting that he had been informed by Alcoa that they had spent $105,000 on RKO's several radio stations. The list reported Alcoa as spending $31,073. On January 31, 1963 Ragsdale wrote Wilke that he had received from Alcoa a list of their purchases from three RKO stations for 1962 including $8,000 with KHJ, Los Angeles. Wilke was asked to check the accuracy of the figures.

131. On February 25, 1965 an Alcoa official wrote to Wilke acknowledging a letter from Wilke and stating that a survey had been run on Alcoa activities in connection with RKO properties. The letter explained that Alcoa's main use of radio and television was through national networks. However, the letter noted, RKO's facilities were being used at least to some extent. Alcoa's expenditure on RKO's San Francisco station was given, as well as an expenditure of $2,192 for KHJ. The writer stated that he was passing the information contained in Wilke's letter on to Alcoa's two advertising agencies "with the recommendation that 'all things being equal,' it would be helpful if we could do business with some of your other broadcast properties." The letter concluded with the observation that the writer would be glad to meet with General Tire representatives and suggested that the latter be sure and meet the person in charge of Alcoa's broadcast activities.

132. On May 5, 1965 Wilke wrote the Manager of Trade Relations of Alcoa. The entire body of the letter reads:

> "I just received word from the manager of our Chicago operations that he had confirmation of the Alcoa schedule for KHJ-TV.
>
> "He was elated the way things worked out and I want to thank you for your prompt efforts in our behalf. Will see you in New York the week of the 17th."

133. On July 2, 1965 an Alcoa inter-office memorandum stated that an attached document had been discussed with Wilke who seemed well pleased. The attached document was also an Alcoa inter-office memorandum reporting four purchases of advertising time by Alcoa over RKO stations. The memorandum further stated that in respect to a second wave of TV time purchases that was to shortly occur, Alcoa's advertising agency would be asked to make every effort to schedule time on RKO stations. Projecting past purchases from RKO with future purchases, the memorandum forecast a $10,000 figure for current year purchases by Alcoa from RKO stations for its aluminum-beer-can-easy-opening-top advertising campaign.

134. Alcoa spent no money with KHJ-TV in 1962, 1963, or 1964. Between January and November, 1965 it spent $8,069.

American Airlines

135. In a General Tire Trade Relation and Customer Activity Report on American Airlines the following item appears for October 26, 1962:

"Filson to JGR [Ragsdale] in addition to the million a year we spend for tickets with American Airlines, note Aerojet has paid them $102,000 past nine months for Air Freight.[6] RKO up till last year enjoyed some business with their advertising agency until they changed agencies and RKO was dropped. I understand their advertising contract for 1963 is coming up and RKO is trying to get back in. I am going to see District Sal Manager [sic] of American here and solicit his assistance. Caffee advised that unless there is some reason such as schedules and routings that require use of American, we need not favor them. You might want to pass this on to Bob Wilke."

136. On November 8, 1962, Wilke wrote a letter to the Vice President of American Airlines for Public Relations, the body of which reads:

"I enjoyed lunching with you yesterday and appreciated the opportunity to talk to you about the scope of the General Tire operation.

"For your information the identity and location of the RKO General broadcast facilities is as follows:

RADIO		TELEVISION
New York	WOR	WOR-TV
Boston	WNAC	WNAC-TV
Detroit	CKLW	CKLW-TV
Los Angeles	KHJ	KHJ-TV
Memphis	WHBQ	WHBQ-TV
San Francisco	KFRC	
Washington	WGMS	

[6] Aerojet is a subsidiary of General Tire.

"I know that our entire organization will be very pleased if the RKO General radio stations are permitted to share in the forthcoming American Airlines campaign."

137. There is evidence that RKO sold American Airlines over $100,000 worth of advertising in 1961, and that KHJ-TV after 1964 sold American Airlines some advertising.

Burlington Industrial Fabrics Co.

138. On July 13, 1961, the Vice President of Burlington Industrial Fabrics Co., Thomas B. Hill, wrote Wilke concerning a telephone discussion between the two held the day before. The subject was Burlington's broadcasting schedule for the fall on behalf of its support-hose division. In the letter Hill reported that the President of Burlington's Industrial Fabrics Company had held discussions with Burlington's Hosiery and Publicity Departments along the lines of prior discussion between Hill and Wilke so that it would be known that Burlington was "putting in an oar" for both its Industrial Fabrics Company and General Tire. The advertising agency handling the campaign was named and a recommendation was passed on that Wilke should keep in close touch with the agency. Note was taken of the fact that the agency would undoubtedly be interested in optimum coverage but it was also noted that the facts concerning mutual interests and present business relationships had also been passed along.

139. The record does not show what, if anything, Burlington Mills spend on KHJ-TV. It does show that between October 1, 1960 and September 30, 1961, it spent $1,657 with RKO.

Cardinet Candy Company

140. After effort in that direction was made by Filson, some time in 1962 or thereabouts, candy machines of the Cardinet Candy Company were installed in Aerojet plants. Subsequently, Cardinet gave KHJ-AM a $10,000 order for advertising. Filson was complimented for his efforts by "RKO Sales." The commendation pointed out that previous efforts to sell Cardinet had been unsuccessful and without Filson's help the Cardinet order could not have been achieved.

141. There is no evidence that KHJ-TV received any business from Cardinet as a result of Filson's effort.

Carnation Co.

142. In 1962 Carnation was an advertiser over KHJ-TV. In a memorandum from Filson to Ragsdale written in July of 1962 the following statement was made:

> "The Cafeteria [Aerojet's] is catered by Hording-Williams of California. Under the contract Space General [Aerojet] controls the brands of products used. Carnation dairy products were specified, as we are now getting the Carnation tire business in Los Angeles."

143. Carnation did purchase advertising time on KHJ-TV. There is no direct evidence, however, that the purchase of such time formed any part of the consideration for Carnation dairy products being used at General's Aerojet cafeteria.

Duncan Coffee Co.

144. In a memorandum from Filson to a W.A. Robinson dated August 19, 1963, with copies to Ragsdale and Murphy, Filson stated: "I have just completed arrangements with the Duncan Coffee Company of Houston, Texas, for exclusive use of General Tires on all their vehicles." The letter went on to outline the particulars of the arrangement. On November 5, 1963, Filson wrote Ragsdale that Huggins-Young, a subsidiary of which produces Butternut Coffee, does considerable radio and television advertising on the West Coast, some of it through KHJ. Filson said that he had briefed Trenner "on our relationship" and that Trenner's people would talk to the "advertising people" and that "this" would enable them to get additional advertising. On November 20, 1963, the Vice President of Huggins-Young sent Filson a report on the number of tires Pico Lease had bought from General Tire through Mileage Consultants. The purchases totaled $5,500. The letter also assured that Huggins-Young had bought some time on KHJ-TV. On November 22, 1963 Filson wrote to Ragsdale re "Duncan & Huggins-Young" that "Pico Lease" is the company established by Mileage Consultants to handle lease of vehicles to Duncan Coffee in Texas and that Pico Lease had bought $5,500 worth of tires in three months. On the same subject, Filson reported that Boulevard Lease was the West Coast counterpart of "Pico Lease." Filson said that he would forward the quarterly report of Boulevard Lease to Ragsdale and asked Ragsdale to note that Boulevard Lease is also doing advertising on KHJ.

145. The record shows that while Pico Lease and Boulevard Lease spent no money with KHJ-TV between December 1, 1962 and November 30, 1965, Duncan Food Co. during that period, in 1963, spent $15,307 with the station.

Equitable Life Assurance Society

146. Thomas Ferns sold the original group life insurance policy to General Tire and Rubber for Equitable. Thereafter he sold group policies to General Tire subsidiaries. Ferns had long been with Equitable and since 1934 had handled General Tire and its subsidiary accounts.

147. On November 13, 1962, Trenner wrote to an RKO official:

> "I was impressed with the Equitable meetings, especially when I learned that the General Tire Company policy represents more insurance than lots of fair size companies in this country.
>
> "We surely must be paying Equitable a lot money. Enough, in fact, so that they are able to buy time on competitive radio stations in Los Angeles and leave KHJ and KFRC off the list.
>
> "I am sending Mr. Ragsdale a copy of this letter. He will get the point, I am certain."

148. Ragsdale responded on November 15, 1962, and recommended that the man in charge of group insurance at Equitable be contacted. He agreed that RKO should get some business from Equitable in view of the amount of business General gave Equitable.

149. On January 22, 1963, one of RKO's station employees at Detroit, reporting lack of success in selling advertising to Equitable over CKLW, suggested that General Tire should put pressure on Equitable. On January 30, 1963, Thomas Ferns sent telegrams to a Vice President and an Agency Manager of Equitable in San Francisco. Ferns noted that he had recently been in San Francisco installing group life insurance at RKO's KFRC. Some time thereafter he learned from the

manager of the station that Equitable's advertising agency was going to review advertising contracts for Equitable in the Bay Area. Ferns asked as a personal favor that the advertising be placed with KFRC. Equitable's Agency Manager in San Francisco responded with a long letter to Ferns. He stated that he had investigated the matter. He found that Equitable's advertising agency in selecting outlets for advertising throughout the country had included four of RKO's stations but that KFRC had been eliminated because of inadequate coverage. Despite group coverage and the Tom Ferns relationship, Equitable's advertising department could not justify buying from KFRC. The Agency Manager noted that the atmosphere had become disagreeable since the RKO representative had indirectly threatened to take away Equitable business.

150. On February 1, 1963, Ragsdale wrote Ferns that while RKO was getting some business from Equitable, they were having trouble in Boston, San Francisco and Los Angeles. The letter said that RKO salesmen did not want to be overly aggressive but the station managers found it hard to reconcile the fact that they are not being given an opportunity to run advertising for Equitable while it is being placed in their markets on competitive stations. Ferns' "good offices" were solicited to see "if you can help us in this particular situation."

151. On the same date an RKO official by letter thanked Ferns for the "pitch" he had made on behalf of KFRC, and a Regional Vice President of Equitable at San Francisco in an inter-office memorandum of conversation, noted that Ferns had called mentioning that he had telegraphed two Equitable officials urging that KFRC be favorably considered. The memorandum concluded with the following observations: it appeared RKO was not receiving Equitable advertising in Los Angeles; because of this Ferns thought an Equit-

able official should meet with officials of Aerojet to have Equitable's advertising channeled through RKO; the writer thought it better that he pursue the matter with "Home Office" advertising and public relations people, to which suggestion Ferns agreed; Ferns would supply a list of stations and persons to be contacted.

152. On February 5, 1963, Ferns gave Ragsdale a summary of Equitable's efforts on RKO's behalf concluding with the view that Equitable business could probably be obtained for RKO's Los Angeles and San Francisco stations but not for its Boston station because of labor union problems Equitable was confronted with at WNAC (RKO's Boston station). The letter closed with assurance from Ferns that he would do everything he could to get business for RKO and General Tire.

153. On February 5, 1963, Equitable's advertising manager was also writing Ferns. She said she was sorry KFRC, San Francisco, could not be used in Equitable's current spot radio campaign but good schedules had been placed at four other RKO stations. She explained many factors had to be considered in radio purchases and RKO's San Francisco and Los Angeles stations just didn't measure up, their ratings being so poor that Nielsen didn't even list them. Explanation had been made to RKO's New York salesman. Whenever possible RKO's stations had been used with full knowledge of the importance to Ferns of such use.

154. On the same date Ferns wrote the Equitable official to whom he had previously phoned and again asked for help on RKO's Los Angeles and San Francisco stations. Ferns said he was puzzled by Equitable's advertising agency's reliance on Nielsen ratings since in Akron Equitable had a radio campaign that was using three stations, two of which could hardly qualify from a market coverage basis. Ferns said he

was disturbed by the veiled threat of taking RKO business away from Equitable. This letter closed with this language:

> "Please use all your excellent persuasive efforts to have the Equitable use both KFRC in San Francisco and KHJ in Los Angeles. Harry Trenner in Los Angeles, Director of West Coast Operations, is a wonderful person and if there is any possible chance of our doing business with them, we certainly should do it because they have a splendid organization in Southern California. As I told you on the phone, the second day after the Group Insurance became effective, December 2, we had a $12,000 death claim in Los Angeles.
>
> "The organization in San Francisco under Al Rocco is also of very high caliber. They do not, however, have a TV Station but it seems to me that they could be very favorably considered for some business from us regardless of their market coverage.
>
> "As you know, Walter, I do not like to use pressures but I don't know of any other Broadcasting System that is doing business with the Equitable and certainly RKO-General, Inc. should be favored because they are a wholly-owned Subsidiary of General Tire and Rubber Company.
>
> "Good luck and I would appreciate hearing from you before you leave New York.
>
> "With kindest regards."

155. On February 28, 1963, Trenner wrote to Ferns. In this letter Trenner said: He was glad to have recently visited Ferns; the last time they had been together a good share of General Tire's west coast radio operation had purchased the Equitable Insurance package; he was interested in what Ferns had told him as to why the RKO west coast stations had been excluded from the Equitable spot radio buy; he had been on Madison Avenue for 15 years and he knew they had to employ a certain set of criteria but "slip stick" measurement without further necessary knowledge could at times be misleading; there was nothing mandatory in RKO's buying Equitable insurance, however the company's recommendation carried great weight as did the persuasiveness of Ferns, Equitable's reputation, and "a little boost from some of us out here"; but "was it the cheapest buy we could have made?"; Ferns' response to such rhetorical questions was well known; nothing was expected in return for RKO's having bought Equitable insurance, but the chagrin and hurt pride of RKO could be imagined when it was learned that Equitable was advertising only on RKO's competitors' stations; such concerns did not occur to purchasers of advertising on a nationwide basis; merely because some RKO stations had been purchased did not mean that RKO had been favored to any great extent; advertisers over WOR in New York feel lucky to be on the station; it was hoped RKO's message would get to the right Garcia; RKO's advertisers did not consider their money confetti; insurance companies that advertise over RKO do not think they've made a bad buy; indication of future consideration was "rather poor reciprocation for the job we did for you out here." The letter concluded with thanks in anticipation of future efforts in behalf of RKO. Copies of this letter were sent to Ragsdale, Watson and Quinn.

156. On March 28, 1963, RKO inter-office correspondence indicated that Tom Marks at KFRC was "shook up" every time he saw an Equitable advertisement over a competitor station and inquiry was made if the matter could be reopened with Equitable's advertising agency. He was informed that the agency considered the matter closed, that RKO's national sales manager had talked to Equitable's advertising manager again reminding of the relationship between Equitable and General Tire but found the latter in agreement with the agency. Wilke advised that at national headquarters of General Tire attempt was being made to "get the whole thing resolved once and for all," noting that since another advertising campaign was coming up it would be nice to know that Equitable, and their advertising agency, had their signals straight.

157. On April 11, 1963, an Equitable Vice President wrote to Trenner saying that he had had a pleasant conversation with Wilke, that Equitable was planning a spot radio campaign in the fall and that then all stations would be reviewed. Trenner's recent letter to Ferns had been forwarded to him and would be placed in the review file.

158. There is no evidence that Equitable ever bought any time over KHJ-TV as a result of the General Tire efforts outlined above.

Fugazy Travel Bureau

159. On November 1, 1962, Ragsdale wrote to Jack Poor of RKO saying that he was sending an attached letter to all General Tire facilities which could be served by the Fugazy Travel Bureau. Ragsdale stated that Fugazy would report to him on a semi-monthly basis and that a system would be established whereby a check could be made on Fugazy's

figures. The attached letter stated the following: General Tire had entered into a corporate-wide agreement with Fugazy whereby it would use Fugazy facilities wherever possible for transportation reservations and tickets; an explanation would be furnished of facilities available to General Tire; in the future instead of dealing with carriers, transportation should be obtained from Fugazy; use of Fugazy would materially lower transportation costs to General Tire. On March 14, 1963, Ragsdale wrote Aerojet to the following effect: General Tire in Akron had been using Fugazy with good results; when agreement had been made with Fugazy, Aerojet had been fully informed and had promised full cooperation; thus far Fugazy had received no Aerojet business and was completely staffed and ready to handle such business; use of Fugazy benefits General Tire; lack of service might offset benefits but experience in Akron had been good; it would be appreciated if the Fugazy program would be started at Aerojet as soon as possible; if there were good reasons why Aerojet could not be used an explanation would be appreciated. On April 18, 1963, Fugazy wrote Aerojet to the following effect: an appeal was being made for fair play and ethical business; a handshake agreement had been made in New York in September 1962 under which Fugazy agreed to spend an amount equivalent to 1-1/2 of its gross billings to General Tire on advertising over RKO stations in exchange for handling the travel of General Tire and its subsidiaries including Aerojet; while establishment of a Fugazy office in Akron had been easy, on the West Coast, because of Aerojet volume and nature of traffic, the problem was different; Aerojet officials had been cordial and cooperative and a proposal submitted by Fugazy had not been disapproved; on the basis of agreements and discussions Fugazy had spent $20,000 on West Coast installations; Fugazy had been informed of termination of agreement. The letter concluded with a long argument on behalf of Fugazy and assurance was made

that the matter could be worked out. On April 18, 1963, the President of Fugazy wrote Tom O'Neil referring to the difficult time his agency was having with Aerojet and soliciting O'Neil's intervention in the matter. Reference was made to the fact that $20,000 had been spent by Fugazy in setting up West Coast offices and that it would be very unfair to take the account away. Reference was also made to a rumor, attributed to lower echelon personnel at Aerojet, that American Airlines was considering removing business from RKO unless the Fugazy "account is returned." Fugazy assured O'neil that this was not American's intent.

160. On July 12, 1963, the President of Fugazy wrote the President of General Tire. In the letter he stated that Fugazy had been unable to complete arrangements with Aerojet and had been forced to close the offices that had been opened to service Aerojet. He felt sure that Fugazy could have served Aerojet, could have saved General Tire money, and could have contributed to RKO's advertising volume. The General Tire-Fugazy agreement in Akron had resulted in what promised to be successful operation for Fugazy. In the case of Aerojet, Fugazy lost over $25,000. The difficulty he attributed to Aerojet, "In all my years in the travel business, I have never seen more intrigue and deception. . . . I am truly embarrassed that your fine organization and our own would have our names associated with such intrigue and foul play." The letter continued with: an expression of doubt as to whether the situation could be salvaged; an observation that General Tire owed Fugazy an obligation; and an expression of confidence that corrective action would be taken. A letter to the President of Fugazy from the President of General Tire dated September 4, 1963, agreed to payment of $15,000 to Fugazy in "settlement." The letter expressed regret as to how things had turned out and hope was expressed that the future would develop mutual benefits. On September 9,

1963, the President of Fugazy wrote Ragsdale. The letter made the following points: Fugazy had been informed that Hertz was definitely placing General Tire on its approved list; Fugazy would like to move its Akron office to a General Tire retail store; it would like to share profits in lieu of rent; in settlement of Fugazy's loss [$23,000 loss from the West Coast operation] it had been agreed that in addition to the $15,000 cash payment General Tire made, Fugazy would be under no obligation to buy RKO advertising until $8,000 had been realized in net profit from servicing General Tire; Fugazy proposed that a 60-40 profit split be accepted in lieu of rent after $8,000 in profits had been realized by Fugazy; in a special arrangement with Hertz, Fugazy was to get an additional 5% above the 20% reduction given the General Tire complex business, which in volume was in the vicinity of $500,000. The over-ride income would be credited to the Akron office thereby making possible an immediate $25,000 source of income. Such an arrangement would involve mere paperwork routine.

161. On September 25, 1963, Ragsdale wrote the President of Fugazy thanking him for the help he had apparently given General Tire with Hertz Corporation. The letter went on to discuss the proposal that Fugazy locate in General Tire's Akron retail store. A dim view was expressed of the proposals to split agency profits in lieu of rent and to share in the over-ride Hertz was to pay Fugazy on General Tire business. The letter closed, "I don't feel we should enter into an agreement with you regarding the Hertz proposition but certainly do appreciate whatever help you can give us in cornering more of their tire business."

162. There is no evidence in the record that Fugazy ever purchased any time over KHJ-TV.

General Electric Company

163. On February 26, 1962, Wilke wrote to R.D. Moore, Director of Trade Relations, General Electric. The body of the letter reads as follows:

> "Confirming our conversation, the locations and types of our several broadcast facilities are as indicated below.
>
> "I would certainly appreciate your mentioning to Marty King in Cleveland that RKO General is a division of the General Tire Company. I am sure an awareness of the mutually beneficial association between General and General Tire will be helpful to us when Marty is directing the placing of his radio and television schedules."

164. General Electric spent no money on advertising with KHJ-TV between December 1962 and 1964. Between January and November 1965 it spent $5,100.

Hercules Powder Company

165. Hercules is a supplier of General Tire. In 1963 Ragsdale approached the company to buy time over RKO stations. He was told that the only such purchase in which Hercules would be interested was over RKO's Memphis station, WHBQ.

166. There is no evidence that Hercules made any purchase of advertising from any RKO station as a result of Ragsdale solicitation.

Hertz Corporation

167. A Trade Relation and Customer Information Report of General Tire on Hertz contains an entry dated July 19, 1961:

> "JBF to JGR [Filson to Ragsdale] – presently using National 45%, Hertz 35%, and Avis 20%. Are considering entering into a national agreement with one of the agencies. Do you have any preference?"

Another entry dated July 31, 1961, reads:

> "JGR to JBF – we do business with all three. Probably get more tire business from National but would have no particular interest with which company you made a nat'l agreement. Don't understand your purpose in making a national agreement when you get the same price from all."

Thereafter appear a number of entries relating to the Hertz – General Tire relationship including one dated July 13, 1962, which in pertinent part reads:

> ". . . They have agreed to all things we requested and to see that we get much larger share of their business however everything is being held up until our price is adjusted . . ."

In a letter dated August 24, 1962 from Trenner to Filson the following item appears:

> "I don't think it is necessary to rehash the Hertz deal which represented some of your efforts while at Aerojet and some after you had been transferred to Trade Relations. These people have been

> important radio and TV customers to us during the past fiscal year, and we can expect more business from them upcoming."

168. During the following years, these amounts were spent by Hertz over KHJ-TV: 1962 - $63,550; 163 – $90,025; 1964 – $20,400; 1965 – $9,350; 1966 – $15,210.

Humble Oil and Refining Co.

169. Some time in the early 1960's Ragsdale contacted his trade relations counterpart at Humble Oil, Edward V. Dorr. This contact was not considered by Dorr as pressure but one common in any business relationship. Dorr had had prepared a list of RKO facilities and the amounts Humble had spent with them. He referred Ragsdale to the Humble advertising agency. Ragsdale had RKO people call on the agency. Ragsdale then asked Dorr to notify the advertising agency of his interest. Dorr notified both the agency and Humble's advertising department of his interest. His interest was, if possible, to have RKO time purchased. Ragsdale later told Dorr that RKO was negotiating business with Humble's advertising agency and that while they were in good shape elsewhere they might have difficulty in Los Angeles and San Francisco. Dorr then sent a letter to Humble's marketing headquarters to the effect that it would be appreciated "all things being equal on quality and price, etc." to have RKO strongly considered since it is "presume[d] these folks are owners of good stations."

170. There is no evidence that Humble made any purchases from KHJ-TV as a result of this negotiation.

Langendorf Bakery

171. In 1962 Trenner suggested to Filson that if General Tire's subsidiary Aerojet changed suppliers of bread for its cafeteria, there would be created an advertising potential of $50,000. Langendorf had been purchasing time on KHJ-TV and in the year the statement was made had spent some $9,000 with the station. Filson checked on the matter. He found that the bakery then supplying bread to the cafeteria had, during a six-month period, bought $50,000 worth of General Tire's tires. Filson countered by asserting that Langendorf had spent $20,000 annually at KHJ-TV and KHJ-AM. Later the Aerojet cafeteria did buy some bread from Langendorf.

172. The record does not disclose the impact of Filson and Trenner's efforts on KHJ-TV sales to Langendorf. Purchases of advertising time by Langendorf from KHJ-TV between 1962 and 1966 ran as follows: 1962 – $8,860; 1963 – $8,675; 1964 – $10,500; 1965 – None; 1966 – $3,300.

Lyon Van and Storage Co.

173. In 1963 Lyon used General Tire tires on its vehicles. General Tire recommended Lyon, among others, for use in moving General Tire employees from place to place. In the fall of 1963 Filson met with Lyon's General Sales Manager. In early 1964 he was told by a Lyon official that Lyon planned to place $30,000 in business with KHJ. Later in 1964, an official of Lyon gave Filson the dollar amount of purchases Lyon had made from General Tire in 1964 and estimated a future 50% increase in purchases, and mentioned some $11,000 to be spent with KHJ.

174. There is no evidence of what, if anything, was spent or was to be spent by Lyon on KHJ-TV as distinguished from KHJ-AM. Further, there is evidence that the $11,000 contract to which the Lyon official made reference may have been cancelled.

Olin-Mathieson Co.

175. A Report of Call dated April 30, 1963, written by J. W. Fleck of Union Carbide and circulated to six Union Carbide officials, covered an interview between Fleck and D.A. Kepler, Director of Purchasing for General Tire and Rubber. The report began by noting that Kepler had disclosed further details of a General Tire deal on polyols with Olin-Mathieson. These were the details listed by Fleck.

> "1) Agreement between General and Olin is verbal; not written.
>
> 2) Basis for agreement is Olin's purchase of Radio and Television advertising from General's RKO affiliation.
>
> 3) General have agreed to make a minimum dollar purchase of polyols. We think this probably is an exchange of dollars on a fixed ratio in return for a fixed amount of advertising dollars.
>
> 4) There is no definite duration for this agreement."

The memorandum went on to say that he and the General Tire Purchasing Agent commiserated with each other over the lack of polyol sales made by Union Carbide to General Tire in view of the fact that Union Carbide furnished a qualified product. The General Tire agent ordered a list prepared of

what Union Carbide could furnish General Tire and indicated that later a forecast would be furnished of what purchases during 1963 General Tire could make from Union Carbide. Assurance was furnished that advice would be sought from General Tire's President (after he had returned from Europe) to see if the Olin deal was flexible enough "to lower the Olin polyol commitment in view of General's reduced consumption." In summary, the letter went on to point out, the General Tire purchasing agent was sympathetic to Union Carbide and a Union Carbide official would investigate the advertising situation.

176. Earlier in the year, on January 23, 1962 the President of General Tire sent to the President of Olin-Mathieson a letter which in pertinent part read:

> "I want to thank you very, very much for the hospitality you showed Sam Salem, Bob Wilkie, and myself last Thursday. It was a real pleasure meeting you and the other members of your organization.
>
> "I am sure that our two companies will get along well in our new relationship. It should be mutually profitable. As a matter of fact, from now on I'll never mention a rebate on my shotgun."

177. Olin-Mathieson purchased no advertising from KHJ-TV between December 1962 through 1963. In 1964 it spent $12,350 with KHJ-TV. From January to November 1965 it made no such purchase.

Pepsi-Cola Company

178. On August 1, 1962, an oilman from Oklahoma, Walter Duncan, who also had a Pepsi-Cola bottling plant, following

a conversation with the Chairman of the Board of General Tire over working out "something" of mutual advantage to Pepsi-Cola and General Tire, wrote Wilke a letter saying he would like to arrange a meeting between Wilke and the Executive Vice President of Pepsi-Cola, or his representative, to explore the matter further.

179. On August 14, 1962, Wilke wrote to Duncan that such a contact had been made: a luncheon was planned; the General Tire plant manager in Waco, Texas, had been contacted on behalf of Pepsi-Cola; word was that Pepsi was sold at the plant but employees demand favored Coca-Cola; it might be that if there were more frequent deliveries of Pepsi-Cola to the plant more Pepsi-Cola would be sold; the General Tire plant manager had been alerted to General Tire's interest in Pepsi-Cola; Wilke would be happy to discuss with Duncan's dealer what could be done to get more Pepsi-Cola business at the General Tire plant.

180. By letter dated August 22, 1962, Wilke sent a list of General Tire plant locations to a Pepsi-Cola Vice President, Charles N. Baker, and asked that he be called so that "we can further discuss the continuation and expansion of a mutually beneficial association between our respective companies." On September 21, 1962, Wilke wrote the Chairman of the Board of General Tire reporting that he had met with Baker and had discussed the possibility of Pepsi's expanding use of General's broadcast facilities in conjunction with exposing General Tire employees to Pepsi-Cola. On October 15, 1962 Baker furnished Wilke a status report on the use of Pepsi-Cola and Coca-Cola at General Tire plants. By memorandum dated November 6, 1962 to an RKO official, Wilke stated:

> ". . . As a result of some recent reciprocal arrangements, we should in the future share to a greater extent in the Pepsi-Cola spot campaigns where the RKO stations are involved."

This same report indicated that Pepsi-Cola's advertising agency and its owned and franchised bottlers had been advised of Pepsi-Cola's "desire in this respect" and suggested that a good RKO salesman contact the Pepsi-Cola account executive at its advertising agency. On November 12, 1962, an assistant to Hathaway Watson reported that he had advised all [RKO] station sales managers of the General Tire – Pepsi-Cola "situation" and indicated that contact would be established with Pepsi-Cola's advertising agency. On November 20, 1962, Wilke sent the following letter to the manager of General Tire's Waco plant:

> "I understand that someone from Akron has been in touch with you regarding our interest in Pepsi-Cola. Tom O'Neil has asked me to follow thru and thank you for any help you have given or will give the Waco Pepsi-Cola dealer in exposing his product in your plant.
>
> "In addition to Tom's personal interest in this set-up we are in the process of developing considerable radio and television business from the Pepsi-Cola Company here in New York and would in turn like to reciprocate by helping them obtain more business from the various General Tire Plants.
>
> "The Pepsi-Cola Company here has assured me the Waco bottler is now prepared to furnish your operation excellent service and attention, and any help you can give him will work to our advantage in our own radio and television business."

On December 12, 1962, RKO's National Sales Director wrote Wilke saying that the Pepsi advertising agency has been "pressured" to use RKO stations and that all "Sales" could do was to "stay on top" and continuously remind the advertising agency of the Pepsi-Cola – General Tire "relationship."

181. In a Pepsi-Cola inter-office memorandum from Baker to a Roland Ball in Memphis, dated January 7, 1963, Baker stated:

> "Some time ago Bill Durkee established a very fine rapport with General Tire and Rubber Company through their President and major stockholder, Tom O'Neill. As you know, this is a very large company with much diversification, owning besides their basic tire business, electronic development plants, theater chains and TV and radio stations. Bill asked me to work with O'Neill's assistant, Robert Wilkie, to get all the extra business from these diversified activities that could be developed. In return we were to encourage our bottlers to use the various radio and TV stations owned by General Tire as much as possible."

The memorandum concluded with notations of a complaint made by Wilke that RKO was not getting the cooperation that had been expected from Pepsi-Cola in regard to Station WHBQ, Memphis. The memorandum got response from a Memphis Pepsi-Cola bottler to the effect that WHBQ was getting a lion's share of their advertising business, some $21,000 out of an $82,000 budget.

182. In a letter to a Pennsylvania Pepsi-Cola bottler Baker wrote in pertinent part:

"Walter Duncan, who owns a number of Pepsi-Cola bottling companies including Oklahoma City, his home town, is an old and intimate friend of the O'Neil family who practically own General Tire and Rubber Company. In pursuing this relationship it was discovered that among the properties of General Tire, who as you know are quite diversified, was a chain of television and radio stations. Further investigation showed that our bottlers collectively were spending sizable sums through these facilities. The net result was that a Robert Wilkie was assigned by the O'Neils to work with me in getting Pepsi-Cola representation in all installations controlled by General Tire *where feasible*. Bob Wilkie has the title of Assistant to the President. To date we have been making considerable progress."

183. On April 9, 1963, the RKO National Sales Director issued a memorandum to all RKO Station Sales Managers. It reads:

"Sometime ago, I wrote to you informing you of the comments made on PEPSI-COLA. I also gave you the names of who to contact in your specific area.

"PEPSI-COLA has now asked how we are making out with the various bottlers. Please let me know specifically the type of schedules you have secured and the kind of money . . . as far as you can determine, how much they are spending on your competition or anything else that would be helpful in reporting to the PEPSI-COLA COMPANY."

On August 16, 1963, Baker wrote Wilke in pertinent part:

"I put some pressure on our bottler in San Francisco to get him to put some pressure on his advertising agency in your behalf, and I would like to find out what this resulted in, if anything."

184. KHJ-TV's role in the above affair seems to have been minuscule. On April 23, 1963, KHJ-TV wrote a memorandum to RKO's National Sales Director, the body of which reads in its entirety:

"KHJ-TV's only Pepsi spot business since acquainting B.B.D. & O. with our contacts has been as follows:

Last December '62 a one-week saturation and a very low cost per thousand went to KTLA.

"Since then they have offered us the chance to bid for four half hour remote telecasts of races from Hollywood Park in June to July on Friday nights at 10:30 - 11:00 p.m. Had to pass – went to KT LA."

Procter and Gamble

185. On March 30, 1962, Larry Murphy, Ragsdale's assistant, wrote the following memorandum to an accounts manager for General Tire Sales in New York City:

"Before leaving New York Wednesday, I ran down the whole story on Procter & Gamble and you will be happy to hear that they are the No. 1 advertiser with RKO-General.

"This being the case, we will not attempt to switch any business from Procter & Gamble to Lever Brothers and I think we should consider this to be a closed matter.

"My suggestion as far as Lever Brothers is concerned would be that on any further business calling for materials supplied by either one of these people, I am sure our Purchasing Department would be more than happy to consider Lever Brothers."

186. Procter and Gamble has purchased time on KHJ-TV. The record, however, does not disclose the impact, if any, on KHJ–TV business which may have resulted from the policy outlined in the second paragraph of the above-quoted language.

Riviera Manufacturing Co.

187. On January 29, 1962, General Tire's Vice President for Marketing, J.E. Powers, wrote Hathaway Watson to the effect that on a recent trip to Los Angeles he had met David Seigel, a sales promotion manager for Riviera, the largest manufacturers of convertible sleepers on the West Coast. Powers said that Riviera used General Tire's vinyl fabrics, spent considerable money on KHJ-TV, and did some business showing RKO movies. He stated that "[L]ike all of these people they want more time and are willing to spend a certain amount of money but not always the proper amount of money." Seigel had been informed that time rates were strictly up to Watson. Noting that Riviera could mean a million dollars a year in business to General Tire, and that Seigel had never been able to talk to Watson but only to salesmen, Powers asked Watson to call or write Seigel that he would be available for consultation in New York.

188. Watson forwarded Powers' letter to Trenner and asked for a fill-in. On January 31, 1962, Watson wrote Seigel that he would be on the West Coast in April, that if Seigel were

in New York he hoped he would stop in, and that meanwhile if Seigel had any matters to take up with the station he could talk to the manager there, or to Harry Trenner.

189. On February 23, 1962, an intra-General Tire letter noted that Harry Trenner had asked that a check be made of the possibilities of a "co-op" advertising plan for Riviera.

190. On September 18th Trenner wrote Watson. Trenner said that there had been a meeting with Seigel, that Riviera does spend considerable money with KHJ-TV, that as a big user of General Tire products Seigel wants advertising assistance from General Tire. Seigel was promised nothing but was told effort would be made to see what could be obtained for him. Inquiry had been made as to what kind of cooperative advertising funds could be obtained for Seigel but no response had been forthcoming. Trenner closed the letter with the observation that he did not know what "co-op" funds were available to Seigel but that if General Tire could not do more for Seigel than Seigel could do for himself, RKO was in an unfortunate competitive position.

191. There is no direct evidence that Riviera ever obtained a cooperative-advertising agreement with General Tire or RKO. However, Riviera did spend the following amounts with KHJ-TV during the following periods: 1963 – $12,000; 1964 – $12,000; January-November 1965 – $16,000.

Shasta Soft Drink Company

192. An RKO salesman in San Francisco wrote to Trenner inquiring about the chances of gaining distribution for Shasta Soft Drink in Aerojet's two large plants. He stated, "I sincerely believe KHJ, Los Angeles, will obtain a sustaining long-term contract from Shasta if distribution is accomplished."

193. There is no evidence that Shasta was ever sold in Aerojet plants. There is no evidence that Shasta ever purchased any time over KHJ-TV.

Signal Oil

194. On November 15, 1963, Filson wrote Ragsdale a memorandum, the subject of which was identified "Signal Oil Company." In that memorandum Filson stated: (1) he had talked with a Bill McKenzie and a Jim Enright [Enright was with Aerojet] about renewal of a service station lease; (2) he had introduced one Ken Mundt to one Jim Phegley; (3) he thought it doubtful if Aerojet land was available for service station use but noted that Mundt had other leads; (4) he would arrange for Mundt and McKenzie to have a meeting; (5) Signal planned to have an advertising budget and McKenzie was on the committee to choose media; (6) though Signal uses an advertising agency they maintain control of advertising; (7) Signal does some TV advertising and considerable radio advertising; (8) he would arrange a meeting between Mundt and Trenner.

195. There is no evidence that Signal Oil purchased advertising over KHJ-TV.

Standard Oil

196. On August 23, 1962, Filson reported to Ragsdale that he had talked to Standard's Manager of Trade Relations in San Francisco. Filson reported that the "Truck Tire Contract" was still available to General Tire, but the "Advertising Contract" would not go through, due to lack of advertising funds. On September 25, 1962, Filson made a similar report stating that Stadnard was doing some advertising on RKO General and that on his next visit he would arrange for an RKO Advertising Manager to meet with Standard's advertising people.

197. Standard Oil has purchased time on KHJ-TV on a rather consistent basis. There is, however, no evidence that the Filson efforts referred to above resulted in any sale of advertising by KHJ-TV to Standard Oil.

United States Rubber Company

198. On December 4, 1964, Edwin D. Meade, Director of Commercial Relations for the United States Rubber Company, wrote Wilke a letter, the body of which reads:

> "With regard to our telephone conversation I have discussed your interest, in any considerations for audio-visual programs of the type you mentioned, with Mr. Art LaCour of our Public Relations Department. He is aware of our business relationships and I am sure we will be glad to see your people at any time. He mentioned, in fact, that he expected a visit from your Mr. Canini this week.
>
> "I also tried to reach Mr. Duncan Ross, in charge of Public Relations at our Naugatuck Chemical Division, but he was out of town and not expected until next week; but I will get in touch with him along the same lines as my discussion with Mr. LaCour."

199. The record shows that U.S. Rubber spent the following amounts with KHJ-TV: 1963 – $18,220; 1964 – 0; January-November 1965 – $8,450.

200. In addition to the foregoing incidents Fidelity also tendered a showing on trade relations in action between General Tire and Chemstrand Co. and Sun Oil Co., as well as one involving General Tire and Bekins Moving and Storage

Co. As with many other facts developed on this record, the facts on these relationships do not rise to that level of materiality as to justify their recitation in findings.

201. It might also be noted that a distinguished expert in the field of economics, Dr. Theodore J. Kreps, Professor Emeritus of Business Economics at Stanford, testified in this proceeding. Dr. Kreps deplored reciprocal trade arrangements between large corporations, as ultimately harmful to the nation's economy.

Conclusions

General Tire

1. Findings covered in paragraphs 22 and 23, above, show that the licensee is, in fact, one of the nation's large conglomerates. The parent organization, through its subsidiaries, manufactures a wide variety of products and furnishes for sale numerous services. On occasion, within the complex, lines of authority appear to be blurred, as in the case of Hathaway Watson and John Poor (see paragraphs 29, above). As far as the Commission is concerned, however, such problems appear singularly the conglomerate's own business for no part of KHJ-TV's case rests on the theory that the station's shortcomings are merely fallout from inherently inexplicable intra-corporate phenomena. As noted in paragraph 29, above, taking the stand at hearing were numerous General Tire, RKO, and KHJ-TV executives and subordinates. None sought to turn his back on the fact that KHJ-TV is licensed to RKO, that RKO is a subsidiary of General Tire and Rubber, and that the rubber company is responsible for, and accountable for, the acts of the television station. In the field of corporate regulation that target for assessment of responsibility is not always so easy to find. It is to the credit of

the applicant for renewal of license that no such problem is here presented.

2. Findings covered in paragraphs 25-28, above, leave no room for doubt that General Tire, through its subsidiaries, has made significant contributions in the field of broadcasting, both at technical and program levels. Not the least of these contributions has been its responsibility for keeping the breath of life in experimentation with a whole new system of television broadcasting – subscription television (pay TV). Equally noteworthy was the company's presence in the vanguard of those who first cracked the motion picture producers' antipathy toward making their products available to television audiences. In assessing licensee qualifications, such contributions as those noted in the cited paragraphs are easily the subject of elision and it is easier to slough them off as accidental "spin offs" from a conglomerate's main mission – making money. The fact remains, however, that these accomplishments took time, effort, money, tenacity, and a measure of fortitude, that KHJ-TV's steward was responsible for them, and that America's technical competence and its culture have been advanced by them.[1] Only cynicism of a high order would deny that such contributions significantly enhance licensee qualifications.

3. Findings covered in paragraphs 38-39 show that KHJ-TV under General Tire had no bed of roses, finacially, in getting started. That it did have initial financial difficulty is not surprising when it is remembered that the station did not, and does not have a network affiliation, and that the city in which it competes is not without considerable in the way of

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[1] Some critical conclusions will be reached hereafter on KHJ-TV's employment of movies as program fare. Nothing there held, however, is intended to condemn motion pictures per se as a source of television programming.

competitive mass communications media. The facts also indicate that the conglomerate's large financial resources stood the station in good stead during its operational loss period. Experience has shown that serious public interest problems can rise when a licensed facility attempts to limp along with inadequate financing. Applicant licensees, such as General Tire, tend to furnish built-in assurance to the Commission that they wiii not be plagued by such problems.

4. Findings covered in paragraph 52 show that if there has been an imbalance in KHJ-TV's programming as to type of programs, such imbalance, quantitatively at least, was kept no secret from the Commission. It will be noted that according to the breakdown set forth in those findings, the station, in all but two non-entertainment categories, exceeded in performance that which it forecast in its renewal application and in those, closely matched application prediction. It will also be noted that in the entertainment category, by including special language programs under entertainment, as was done in the application, the prediction of time to be devoted to entertainment is not far from that reported as actually spent on that type of program. A record of accurate reporting to the Commission is an earnest of good stewardship.

5. The findings covered in paragraphs 54-87 show that KHJ-TV is capable of conceiving, fabricating and presenting programs well suited to meeting the public interest standard. But, the station policies set out in paragraph 34 win for the station no Brownie points. It is no recommendation to KHJ-TV's qualifications that it has so supinely bowed out of competition with network news. Contrary to what appears to be the station's rationale, network news is not the alpha and omega of television news programming. One would think that

a station so richly endowed with broadcasting resources, experience, and financial backing would, if the public interest were in fact the touchstone of its operation, welcome the challenge of competing in a field where it apparently believes there is so much excellence. Its policy of non-interference in serving audience needs, when it believes some other station those needs, viewed in connection with KHJ-TV's record here, suggests that the policy is merely a euphemism for one that dictates dedication of a majority of the station's air time to service of the young, the congenitally gullible and those not very bright. The policy then, in fact, directs the station's programming to an already well served group, and because it does and because it is disingenuous, it can only be held to fault licensee qualifications. The policy of not presenting editorials runs squarely athwart Commission policy. The Commission assesses demerits for failure to editorialize, see WHDH, Inc., *et al.*, 16 F.C.C.2d 1, at 10 and 12-13, 15 RR.2d 411, at 425 and 427; Memorandum Opinion and Order denying rehearing, etc., 17 F.C.C.2d 856, at 859, 16 RR.2d 185, at 190.

6. The facts set forth in paragraph 30, together with those set out in paragraphs 24 and 54-85, support a conclusion that the licensee of KHJ-TV is a broadcaster of many years' experience, having numerous and far-flung broadcast holdings and one fully competent to present, over its facilities, a variety of programming well designed to serve the public interest.

7. The findings set forth in paragraphs 31-37 and 42-51 suggest that KHJ-TV is a large, well-organized operation manned at the supervisory level by experienced, well-trained and doubtless able men. Basic policies of the station are established at the headquarters of General Tire. Like most companies that have multiple broadcast holdings, General Tire has a policy of seeing to it that its broadcast station personnel

are active in local civic affairs. These associations, on the part of KHL-TV personnel, have on occasion resulted in suggestions concerning programs to be presented over the station. Moreover, on occasion such suggestions have contributed to programs being presented.

8. Facts in paragraph 87 show that General Tire is not averse to increasing the expenditure of money for programming. Those shown in paragraph 88 indicate that KHJ-TV has won a measure of success in increasing audience during non-prime viewing hours. Those shown in paragraph 89 establish that there are a number of people in the Los Angeles area that speak well of the station.

9. Most damaging to General Tire as licensee are the facts set forth in paragraphs 91-97. KHJ-TV is licensed to serve the public interest. That it is located in a community that teems with talent and has its full share of social, economic and political problems are facts that can be officially noticed. That the public's spectrum space is in short supply is a fact so well known as to forestall discussion. Yet in light of all those considerations the cited paragraphs show that an inordinate amount of time was devoted by KHJ-TV to a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, hour after hour, day after day, week after week, month after month, year after year, ad infinitum ad nauseam. To hold, and such is the holding, that this kind of air-time utilization does not serve the public interest is an exercise of restrained understatement. Such air use by a station serves well the interests of the station and the advertiser. As the record amply demonstrates, it barely touches service to the public, much less service in the public interest.

10. In arriving at the foregoing conclusions full attention has been accorded the fact that besides old movies and commercial announcements KHJ-TV has also presented other packaged program material and some material that the station actually produced. By and large this material has been thoroughly described in paragraphs 54-85, above. As already noted, much of the material set forth in those paragraphs appears well designed to serve the public interest. But, it cannot serve to catapult KHU-TV's record into one of service in the public interest when viewed against its interminable use of old movies and commercial announcements for the bulk of its program fare. One swallow does not make a summer, good tires do not make a good automobile, a good appetizer does not make a good meal, and a modicum of public interest programs does not make a public interest operation.

11. Within the facts of record are those contained in paragraphs 98-111. They deal with KHJ-TV's presentation of movies featuring crime and violence. In the conclusion reached immediately above, the Examiner felt singularly free of First Amendment restraints. The rationale there varies little from what might have been employed had the station chosen to take itself off the air the majority of the time, or if General Tire, entirely bereft of its senses, had chosen to employ KHJ-TV for the sole purpose of running a film on the manufacture of automobile tires. The facts referenced immediately above, however, since they do not present a handle for quantitative analysis, do present something more in the way of First Amendment problems. Moreover, it is no business of the Examiner to initially pass on the sticky problem of crime programs over television and its attendant whether-when-and-why corollaries. But this much may unquestionably be concluded. KHJ-TV did present many movies which featured crime and violence. It not infrequently

carried such shows more than once. A respectable and substantial body of community opinion, in unmistakable terms, voiced disapproval of its presentation of the shows in the way that it did. Their disapproval fell on deaf ears. The protests of a viewer's group and a church group appear to have been met only by a gratuitous exhibition of arrogance (see paragraphs 107, 108, 111). Even a protest by a Member of Congress appears to have been treated with scarcely greater respect (see paragraphs 109-110). The licensee attitude thus reflected does not measure up to that sense of licensee responsibility to the public the Commission has a right to expect from those whom it franchises.

12. That movies featuring crime and violence were not the only aspects of KHJ-TV's programming about which many members of the public took a dim view is also amply demonstrated by the facts here under consideration. In paragraph 103 are summarized the findings of a professional organization based on a scientific sampling of public opinion concerning the program side of KHJ-TV's operation. Out of numerous program categories covered by this survey, only as to movies did the report show the station to be anything much more than a subject of apathy to its audience. In paragraphs 104 and 105 are detailed facts which show that an organization of knowledgeable and concerned viewers cited chapter and verse on a wide variety of program shortcomings. In paragraph 112 (the negative counterpart to paragraph 89) is digested testimony of a group of people who do not speak well of the station. Not unmindful that as heretofore noted, KHJ-TV has presented some programming directed at the public interest and that some members of its audience speak favorably of the station, the weight of the evidence clearly points to a conclusion that, wholly apart from the subject of crime shows, the station fails by a good deal to enjoy the respect and support of the audience it serves.

13. The foregoing conclusions cover the facts of record concerning the applicant for renewal of license, RKO General, Inc., up to the close of the first phase of hearing. In the interest of coherent conclusions, the facts developed at the hearing's second phase, concerning the trade practices of General Tire and the import and application of those facts to the qualifications of the station here at issue, are best assessed now, rather than deferring their consideration until after conclusions are reached on the facts covering the qualifications of Fidelity Television, Inc.

14. The facts set forth in paragraphs 126-199 leave no room for doubt that General Tire does engage in a trade practice that falls well outside conventional concepts of sale and purchase. The practice involves the parent company's buying and selling goods and services on behalf of itself as well as on behalf of its subsidiaries. Sales and procurement personnel of the parent company, or its subsidiaries, play no substantial role in the practice. Rather, it is effected by a group of specialists out of parent company headquarters. These specialists are equipped with data on the trade records of the companies with whom they negotiate. Particularly are they equipped with information on the sales and purchase records of the concerns with whom they negotiate vis-a-vis General Tire and its subsidiaries. The practice is called " "trade relations." It does not appear to be a practice unique to General Tire. As practiced by General Tire, it involves many facets of the company's far-flung holdings, including its broadcast interests which, of course, include KHJ-TV. "Trade relations" with General Tire demands a good deal of effort and undoubtedly a good deal of talent in the art of persuasion. The theme of the practice is "you buy from me – I buy from you." Although there is evidence that some employees of General Tire may have employed such language, the record here does not support a conclusion

that express threat of refusal to purchase forms any part of General Tire's "trade relations" practices. Generally, but not always, "trade relations" is carried on by General Tire with other large concerns or conglomerates. The ethos of this latter group does not embrace internecine strife simply because none in it are the least bit interested in vying for Pyrrhic victories.

15. From the standpoint of licensee qualifications, the fact that KHJ-TV is involved in its parent company's "trade relations" suggests several licensee qualification disabilities. First, on its face, relegation of the end product of a government licensed public service operation for use as small change in inter-corporate deals is infra dig such an operation. The rationale here used is the same that keeps laxative ads from flying atop the Washington Monument and public officials from endorsing commercial products. Second, the removal of competition from the comparative openness of the broadcast market place to the mysterious marts of inter-corporate exchange creates serious competitive difficulties for those without access to those marts. Many of the nation's largest advertisers are conglomerates and all, in one way or another, trade with conglomerates. How does a station whose only business is broadcasting go about satisfying a prospect whose interest, when placing an advertising contract, lies not only in reaching audiences but also in such disparate subjects as the sale of bread to cafeterias, the sale of insurance to groups, the sale of synthetic rubber components to a tire manufacturer, or the sale of soda pop to an industrial plant? The question asked is of course rhetorical. No independent broadcaster can hope to compete in such areas. But KHJ-TV can. It is just such multiple interests that the trade relations practice of General Tire embraces. Throughout its history the thread of concern over the independent broadcaster runs through the fabric of Commission policy. Is it not then only

fitting that a considerable measure of disapprobation be assessed against a licensee involved in a practice so damaging to the competitive position of the independent broadcaster? Third, in paragraphs 122-125, above, there is a discussion of the continued and continuing surrender of air time to the largely private use of licensees and advertisers. While there may be a small group of people in the country that view this development with equanimity and an even smaller group that view it with glee, the Examiner is convinced that most of the public is concerned over it and many are hostile to it.[2] Now if the Examiner is right in this premise, then the trade practices of General Tire present further grounds for concluding that as a broadcast licensee that concern's qualifications are suspect. With the vast array of machinery for getting rid of air time for advertising purposes that already exists in the broadcast industry, one would think that there is hardly a potential advertising dollar in the nation that could escape the sweep of that machinery. Not so. We now learn, through this record, that advertising is also disposed of by this conglomerate licensee at a level to which the ordinary machinery of broadcast sales cannot reach. It is unnecessary to commiserate over the impact this force has on the machinery. The machinery can stand the shock. But, it is important to recognize that this force does create a unique pressure, and a wholly unnecessary pressure, for enlargement of the amount of television broadcast time that is devoted to commercial continuity. It is no accident that KHJ-

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[2] The Examiner must proceed on conviction. In an industry much preoccupied with polls, samplings and surveys, there is a singular dearth of data on the public's reaction to the amount of time devoted to commercial advertising over the air. In over 20 years with the Commission during which time he had read the results of innumerable studies measuring the public's reaction to various facets of broadcasting, he has no recollection of having read one that reported response to the simple question, "Do you believe there is too much advertising over the air?"

TV has the kind of permissive commercial policy that it has. See paragraphs 91-92, above. Fourth, the trade relations practices of General Tire tend to stultify incentive to good programming. What stimulus is there for station ownership, management or personnel to expend energy and risk shrinking ownership's purse, in attempting to program a station in meritorious fashion, when all concerned know that the advertising with which the programming is to be associated can be disposed of through inducements largely irrelevant to program quality? To say that under such conditions all incentive to good programming vanishes, may be answering the question with overstatement. To say, however, that the force of stimulus is blunted, is an answer which not only the character of KHJ-TV's programming bears out, but one that is confirmed by the approach taken to programming by General Tire's trade relations people. In this latter connection reference may be made, for example, to the Equitable Life Assurance incident, paragraphs 146-158, above.

Fidelity

16. Facts set out in paragraph 113 show Fidelity Television, Inc. to be composed of 18 stockholders. Twelve live in Los Angeles or its environs, one lives in San Francisco, and five live in Orange County.

17. Facts set out in paragraph 114 show the stockholders of Fidelity to be virtually free of any ownership interest in any means of mass communication.

18. Facts set out in paragraph 115 show that persons representing 22.68% of the stock of Fidelity would be employed full-time at the planned station. Those facts also show that persons representing all but a nominal amount of the remainder of the stock would spend some time at the station or on station affairs.

19. Facts set out in paragraph 116 show the Fidelity stockholders to be busy businessmen, who collectively represent substantial activity in, and contributions to, a host of civic and professional organizations and affairs.

20. Facts set out in paragraph 117 show that Fidelity claims, as motivation for filing its application, the following considerations: There are 11 television channels allocated to Los Angeles; there are more people living outside Los Angeles but in the same general area than reside within the city; the greatest growth area lies around Orange County, an area considered by the Census Bureau as one separate and apart from Los Angeles; Los Angeles stations are oriented toward big advertisers; a substantial survey conducted by Fidelity through phone calls, letters and meetings indicated that KHJ-TV, of all television stations serving the area, did the least in the way of public service and was notorious for presenting old movies and and an excess of advertising; Commission policies appear to favor diversification of media and integration of ownership with management; conglomerate licensees cannot provide a full measure of public service because of responsibility to stockholders; conglomerate licensees cannot reflect integration of ownership with management.

21. Paragraph 118 shows that Fidelity proposes to move the KHJ-TV channel to Norwalk, California (population 88,000), a city 15 miles southeast of Los Angeles, and also locate an auxiliary studio in Anaheim, California (population 104,000). For what it may be worth, as a conclusion, the fact might also be noted that Fidelity would attempt to use some of the present KHJ-TV equipment were it to succeed here (see paragraph 119, above).

Comparison

22. Before final evaluation, it should be initially noted that the Commission in its order of designation made clear that a hearing involving a contest over a renewal of license presents different problems than do ordinary comparative hearings. It further stated that it had reached no determination as to the weight to be accorded various factors of difference between competitors for a license renewal. It also suggested that the parties in this hearing should feel free to urge any arguments they deem applicable concerning the weight to be accorded evidence bearing on significant factors of difference (see paragraph 2 of the Preliminary Statement, above). It is in the spirit of such language that the following evaluation is made.

23. The present licensee of the station is one of the nation's large conglomerates. That fact has not, however, impaired its answerability as a broadcast licensee. It has vast broadcast holdings. Those holdings, however, are widely dispersed and are located in areas where they have to compete vigorously for the public's eyes and ears. There therefore seems little chance that by reason of General Tire's broadcast interests the public, either in and around Los Angeles or elsewhere, is dependent upon a diet of that company's views and ideas for the intellectual nourishment that is obtainable from mass communications media. The operation of the station is directed and manned by highly experienced and competent personnel. Behind these men stands an organization that is rich in assurance of financial ability, has made significant contributions to the art of broadcasting and is one that, as far as this record is concerned, has a good record of accurate reporting to the Commission. That the combination of conglomerate leadership and station staff is capable of formulating and presenting individual programs that serve the

public interest is a fact the record makes unmistakably clear. The trouble with General Tire's stewardship of KHJ-TV is that, in the overall, its on-the-air operation miserably failed to serve the public interest. This ultimate fact the record also establishes unmistakably. It could well be said of General Tire at KHJ-TV that it "could" but "wouldn't" or "didn't." Why it chose to thus operate the station is of course a question that is locked in the breast of General Tire's management. A good guess would be that with a myopic eye on the dollar it decided "formula broadcasting" would "get by" because the station would never be called to account.[3] If that was the rationale behind the policy that has brought the station to the brink of loss of license, about the kindest thing that can be said of it is that it evinced considerable naivete concerning the stability of regulatory policy.

24. In addition to General Tire's bad record of programming KHJ-TV, it also labors under the disability of having involved the station in a business practice that does not square well with the basic standard under which the station operates. That consideration has been discussed above and it is not to denigrate its importance to say that it requires no further treatment here.

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[3] The formula referred to is as old as time. There have been many practitioners of it, including Phineas T. Barnum and Texas Guinan. One of its most colorful exponents was the western "medicine man". He rolled into a frontier town, bought a round of drinks for the boys at the bar, gave the Sheriff a couple of cigars, called out Little Sheba and went into his pitch selling his own particular brand of snake oil. Modern broadcast counterpart would call for these changes in casting and properties: Boys at the Bar . . . the so-called "Discriminating Audience"; the drinks . . . news, information and some quality entertainment; The Sheriff . . . The Commission; the cigars . . . the station's nod to the Commission's reporting requirements and program policies. Only nominal changes need be made for Little Sheba and the pitch of the medicine man.

25. The foregoing comments will serve to outline General Tire's non-comparative posture. What of Fidelity? Its stock is owned by 18 apparently successful and public-spirited businessmen. None have any substantial interest in media of mass communications. All but one lives in the Los Angeles general area and five live in Orange County. Behind the Fidelity application stands a very comprehensive survey and sampling of public opinion indicating that the locale in which Fidelity would operate its station is well populated, that many people in that area believe the Los Angeles television stations neglect their needs and the needs of the communities in which they live, and that KHJ-TV is the worst television station that purports to serve them.

26. The considerations noted in the paragraph above constitute formidable licensee recommendations for Fidelity as against General Tire. They do, however, require a little comment.

27. While there can be no question that as against General Tire the local ownership characteristics of Fidelity are superior, it should be noted that those qualities do not reach optimum proportions. None of the stockholders live in either Norwalk or Anaheim, the locations of the Fidelity proposed station and its auxiliary studio. If residence identification with a community begets all the public interest advantages that are held out for it, considering the healthy rivalry between communities that is so much a part of the American scene and the Commission's well-known requirement that stations are first responsible for serving the communities in which they are located, it would be more reassuring if all of the Fidelity stockholders lived within the city limits of either Norwalk or Anaheim. As far as the diversification-of-the-media-of-mass-communications criteria is concerned, Fidelity gets a solid preference, hands down. General

Tire has many such media, Fidelity represents virtually none. If the Commission is going to employ its "sudden death" rationale here and hold that any comparative superiority enjoyed by General Tire does not outweigh the comparative advantages adhering to Fidelity because of the latter's freedom from ties with other media, see *e.g.*, McClatchy Broadcasting Company, 19 FCC 343 at 381; 9 RR 1190 at 1220k, then the Examiner ought to close the book here now and move on to the ordering clause. But, it is too well-known to require citation of authority that the Commission's concern over *media diversification, as far as* implementation is concerned, is a sometime thing, and, the Examiner is not clairvoyant. He is, accordingly, emboldened to go on. To him the most solid preference that Fidelity enjoys stems from the fact that its proposal is backed by a comprehensive sampling of public opinion. Even this preference is subject to some reservation. To avoid laboring a subject that could take pages of exposition, the reservation may be simply stated with these questions. Is it consonant with national policy to further contribute to the city of Los Angeles becoming the hole in the doughnut of its surrounding communities? Are we now embarked upon a program of scrapping the allocation scheme that was so painfully worked out by the Commission's Sixth Report and Order?

28. Once it clears the easy (for it) hurdles – local ownership, media diversification and public opinion – Fidelity does not look too good. Attached to its qualifications are no experience in the field of broadcasting, no contributions to the art, no proof through the school of experience of licensee answerability for stewardship, no proof, through the same school, of ability to stand the shock of adverse financial

conditions, and no demonstrated ability to conceive and present programs of high quality.[4]

29. Even under the so-called integration-of-ownership-with-management criteria Fidelity looks bad. The facts shown in paragraph 115 indicate that two stockholders are going to work full-time at the station, that eight are going to work there from 5 hours to 20 hours a week and that six are going to sit on what appear to be working committees. There is no evidence that any of these people have experience in broadcasting. All, however, carry employment titles bearing supervisory connotations. If Fidelity is serious about its proposal, it is projecting an operation that will, at best, be signalized by confusion, and, at worst, by chaos. The station is to have a competent paid staff. Of this we can be sure or staffing would have been placed in issue. It boggles the mind to imagine what is going to happen when a competent staff finds itself supervised, advised, led or guided (or whatever directors, coordinators and committeemen do at a television station) by, roughly, a score of men, wholly without experience in broadcasting, whose efforts would, for the most part, be only sporadically expended. It is just as easy to believe that the torts, crimes, property and corporate work at the law offices of the Messrs. Simon, Medvene, Sheridan and Murphy might be effectively directed by the part-time efforts of a few television men who happen to be members of the bar, as to imagine that the kind of managerial setup Fidelity

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[4] It is certainly no compliment to Fidelity's qualifications that it was unable to get its program proposal into evidence. The announced purpose of the Commission's exclusion of program showings from evidence is to keep records free of "immaterial clutter." See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 at 397, 5 RR 2d 1901 at 1912.

proposes here would ever work at a television station. Proposals such as this are susceptible of two interpretations that should not be shrugged off. Either the proponents honestly believe that operation of a television station, unlike any other enterprise, can be effectively directed by an inexperienced group on a part-time basis, or they advance the proposal for show purposes only without intention to effectuate it. Neither inference is very palatable. The former suggests witlessness. The latter raises questions as to the advisability of entrusting stewardship to those who would attempt to fob off on a licensing agency such a tall tale. Once this latter question is raised, the whole problem of applicant credibility is presented and one begins to wonder if the Fidelity application is really advanced for the purpose of operating a television station in the interests of the public and the audiences in and around Norwalk and Anaheim, California, or, is the application merely a bid to wrest a license away from a vulnerable holder with the intent to dispose of it at the first opportunity, and in the process reap windfall profits out of slight investment. The Examiner, though not personally purged of suspicion, cannot, in good conscience, draw such a conclusion. The Commission's policies favor integration of ownership with management. The Fidelity application was, of course, tailored with the Commission's policies in mind. There is no direct evidence in the record that Fidelity does not intend to try to effect its integration proposal. It is conceivable that with some kind of "consensus of opinion" goal in mind it will attempt to bumble through initial operation with the kind of managerial congeries the proposal contemplates. Accordingly, Fidelity is held to squeak out of its integration proposal with only a demerit for having advanced such a foolish bit of business.

30. Turning finally to the matter of comparison, it is apparent that the record presents a mixed bag of considerations.

They all, however, boil down to this cold hard fact – on the basis of the record, neither applicant is any bargain as a broadcast licensee. Both have serious shortcomings, General Tire's perhaps the more serious. Moving to the stable for analogy, the choice between the two applicants might be likened to selecting between a race horse with acceptable blood lines, good conformation, demonstrated ability to achieve speed, and an unbreakable habit of jumping the track and galloping off to the feed bag, against the chance to acquire, sight unseen, a Chincoteague pony. We live in an imperfect world, however, and the Examiner's job is to make a choice. He will, without much enthusiasm, go with Fidelity Television, Inc. He will do this, primarily, because of KHJ-TV's poor record and, secondarily, because Fidelity does have marked superiority over General Tire in the areas of local ownership, diversification of mass communications media and favorable survey and poll support. All of these latter factors the Commission sets great store by. Although General Tire has an unmatched record of experience and latent competence, these factors have never, and do not now, loom very large among the Commission's reasons for granting preference to one competing applicant over another, see, *e.g.*, McClatchy Broadcasting, *ibid.*, and Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 at 396 and 398, 5 RR 2d 1901 at 1910 and 1912-1913. Further, the Commission's comparatively recent decision in WHDH, Inc., 16 FCC 2d 1, 15 RR 2d 411, stands as the only contemporary precedent governing the disposition of competing applications for renewal of television station licenses. While the facts in WHDH vary somewhat from the facts here, the decision, viewed in its entirety and measured against these facts, leaves little room for doubt that it stands for the proposition that the present licensee of KHJ-TV ought to be replaced by Fidelity. Before making that recommendation, however, the Examiner would like to make a few final observations.

31. Like any corporate licensee, when it took franchise for KHJ-TV, General Tire assumed dual and conflicting obligations. On the one hand it had an obligation to serve the public interest, on the other an obligation to serve the financial interests of its stockholders. Without in any way backing off from what has been here found, that at KHJ-TV it did an inadequate job of reconciling those conflicting interests, it must be acknowledged that it was not aided much in the task of reconciliation by any clear and understandable requirements governing a television station's on-the-air operation. That General Tire could run a good, even excellent, public interest television operation in Los Angeles is a proposition the Examiner is, on the basis of this record, perfectly willing to accept. That General Tire ever would, in the absence of rules setting minimum standards for air-time utilization, long engage in any such operation is a supposition he is unwilling to accept. It seems to the Examiner that this record amply demonstrates that the imperatives of General Tire's obligations, to stockholders, unchecked by countervailing demands on behalf of the public, have constituted an insurmountable obstacle to its engaging in a public interest operation. But there is no evidence that the company is a compulsive law breaker or scofflaw. Quite the opposite, the record inciates that the company has considerable machinery for keeping its operations within the law. The Examiner cannot help but believe that had there been standards governing air-air-time utilization, the station would not have breached them. As bitter a pill as it might have been for General Tire, as a broadcast licensee, to swallow, it is highly doubtful that it would be in the pickle that it is in now if there had been rules that: (1) governed the amount of time that stations could devote to a particular type or source of program; (2) limited the amount of time stations could devote to commercial advertising; (3) prohibited sales by stations of advertising time for other than monetary consideration and

under terms spelled out in their rate cards. The Examiner would add that if such standards, properly drafted and intelligently implemented, breach the First Amendment or are outside the regulatory powers conferred upon the Federal Communications Commission by the Communications Act of 1934, he badly misreads the law, and has no feel for its development.

Accordingly, it is orddred that in the unlikely event an appeal to the Commission is not taken from this Initial Decision by any of the parties, or the Commission does not review the Initial Decision on its own motion in accordance with the provisions of § 1.276 of the Rules, the application of RKO General Inc. for renewal of license of television broadcast station KHJ-TV, operating on Channel 9 in Los Angeles, California, is denied, and the application of Fidelity Television, Inc. for a construction permit for a new television broadcast station to operate on Channel 9 in Norwalk, California, is granted.

Thomas H. Donahue
Hearing Examiner

Report No. 22-35 (9/3/69)

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FIDELITY TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 515 F.2d 684, and the court's order denying rehearing (Pet. App. 34a-93a) is reported at 515 F.2d 703. The decision of the Federal Communications Commission (Pet. App. 94a-119a) is reported at 44 F.C.C. 2d 123 and the Initial Decision of the Commission's Administrative Law Judge

(Pet. App. 121a-282a) is reported at 44 F.C.C. 2d 149.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1975. A timely petition for rehearing and suggestion of rehearing en banc was denied on June 30, 1975, and the petition for a writ of certiorari was filed on July 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's conclusion that the competing license applicants were equal under its comparative hearing criteria was supported by substantial evidence.

2. Whether the Federal Communications Commission could appropriately determine that where competing applicants were found to be equal under its comparative hearing criteria, the public interest would best be served by allowing continuation of the existing service.

STATUTORY PROVISIONS INVOLVED

Relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet. 4-6.

STATEMENT

1. On August 31, 1965, RKO General, Inc., filed an application for renewal of a license covering its

station KHJ-TV, Channel 9 at Los Angeles. On October 25, 1965, petitioner Fidelity Television, Inc., filed an application for a construction permit to build a station at Norwalk, California, to operate on Channel 9 and serve the Los Angeles area. Since the applications were mutually exclusive, the Commission ordered a hearing to determine which of the proposals would better serve the public interest.

2. During the course of the comparative proceedings, the United States filed a civil antitrust suit against RKO General's corporate parent, General Tire and Rubber Company, alleging that the latter had engaged in illegal reciprocal trading practices. The Administrative Law Judge reopened the hearing and received evidence relating to RKO's alleged involvement in anticompetitive practices, in order to determine whether the reciprocal dealings reflected adversely upon RKO's character under the standard comparative criteria (Pet. App. 6a-7a). After a lengthy evidentiary hearing, the Administrative Law Judge concluded that neither applicant was a "bargain," but ruled in favor of petitioner's application "without much enthusiasm" (Pet. App. 280a).

On review, the Commission concluded that although KHJ-TV had been involved in noncoercive reciprocal trade practices, the fact that such conduct had not been clearly held to be unlawful at that time precluded a finding that RKO had engaged in knowing or wilful misconduct. In view of RKO's previously unblemished record as a broadcaster, the Commission

concluded that its trade practices did not merit either disqualification or the assessment of a comparative demerit against its application (Pet. App. 100a-101a).[1]

The Commission found that the two applicants were equally qualified (Pet. App. 107a-108a) and that the public interest would best be served by the continuation of the existing service. It therefore granted RKO's application and denied that of petitioner (Pet. App. 108a-109a).

3. The court of appeals affirmed the Commission's order. It held that the Commission's decision that RKO General's reciprocal trade practices did not merit either a disqualification or a comparative demerit was neither arbitrary, capricious nor illegal in view of the legal and economic circumstances in which the practices occurred and because the Commission had retained jurisdiction over that question pending its decision in another comparative hearing involving an RKO station (Pet. App. 20a-24a). The court also held that the Commission's decision that the traditional comparative factors offered no basis for making a choice between the two applicants was supported by substantial evidence (Pet. App. 26a-32a). In such circumstances, the court held, it was

[1] The renewal of RKO's license for Station KHJ-TV was conditioned upon the Commission's determination of issues pertaining to RKO's competitive practices and character fitness that had been made the subject of a license renewal proceeding involving RKO station WNAC-TV in Boston (Pet. App. 96a-97a). Its decision with respect to anticompetitive practices therefore is open to further consideration.

not reversible error for the Commission to award the license to the incumbent (Pet. App. 32a).

The court declined to rehear the case, but issued a second opinion emphasizing that it did not intend to sanction any general preference for incumbent licensees in a comparative renewal proceeding. Rather, it limited its holding to a situation in which the incumbent had established that it was as qualified to serve the public interest as was its challenger (Pet. App. 34a-38a). The court also emphasized the limited nature of its holding by pointing out that the Commission's comparative hearing criteria had changed since the evidence had been received in this case, and that its decision was, therefore, of little precedential value (Pet. App. 37a).

ARGUMENT

The decision of the court of appeals is correct and presents no question of general importance requiring review by this Court. The Commission compared the proposals of two applicants to determine which applicant would better serve the public interest. The court of appeals held that the Commission's decision was supported by substantial evidence, and stated that its decision was of no precedential importance. Petitioner, in essence, is asking this Court to substitute its judgment for that of the Commission, a function this Court has held to be inappropriate. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229.

1. Petitioner contends that the First Amendment compels the Commission to grant a comparative advantage to whichever applicant holds the fewer interests in other broadcast facilities (Pet. 12-17). This contention is insubstantial. The First Amendment does not compel the Commission to increase diversity in either ownership or presentation of opinion. *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94. Diversity is, however, an important value that the Commission must consider in order to satisfy the requirements of the Communications Act, and it has done so here (Pet. App. 104a-105a).

While the Commission has, on a number of occasions, awarded a comparative advantage to the party having fewer media holdings, it is within the Commission's discretion to decide how much significance to attach to diversification of media ownership in an individual comparative proceeding. *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 239 F.2d 15, 18 (C.A.D.C.). Here, the Commission concluded that the existence of numerous other media outlets in the area and KHJ-TV's record of independent operation (Pet. App. 31a) precluded a mechanistic approach that would have ascribed a comparative demerit solely because of RKO's other media holdings. The court of appeals correctly concluded that the Commission's decision on the diversification of ownership issue was supported by substantial evidence and did not conflict with its prior decisions (Pet. App. 30a-31a).

2. Petitioner contends (Pet. 17-20) that the Commission abused its discretion by refusing to disqualify or assess a comparative demerit against RKO for its reciprocal trade practices. But the Commission's decision with respect to reciprocity is subject to reconsideration in a related proceeding; it renewed KHJ-TV's license conditionally pending completion of other hearings and decisions regarding RKO's trade practices (Pet. App. 99a-101a, 108a-109a). In any event, the Commission's decision was proper. Although the federal antitrust laws undoubtedly are relevant to the Commission's assessment whether the licensee's conduct comports with the public interest standard of the Communications Act (*United States* v. *Radio Corporation of America*, 358 U.S. 334, 351; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 222-224), the Commission could properly balance RKO's trade practices against its unblemished record over twenty-five years as a broadcaster and the uncertain state of the antitrust laws relating to noncoercive reciprocity at that time. In these circumstances, the court of appeals correctly held that the Commission did not abuse its discretion (Pet. App. 23a-24a).

3. Petitioner's claim (Pet. 21-23) that the Commission should not have considered petitioner's failure to comply with certain Commission reporting requirements is unfounded. As a general matter, the Commission prefers applications in which the owners intend to participate in the management of the station's day-to-day operations. The Commission con-

cluded that on paper petitioner had proposed a quantitatively superior integration of ownership and day-to-day operation. However, both the Commission and the Administrative Law Judge concluded that it was unrealistic to believe that petitioner's paper promises would be fulfilled, since most of its owners would be pursuing other full time jobs. The Commission considered petitioner's reporting violations only as corroboration of its conclusion that petitioner's ownership integration superiority was theoretical rather than real (Pet. App. 107a). The Commission's decision with respect to the credibility of petitioner's assertions was supported by substantial evidence, and any error in considering such matters was harmless. See Pet. App. 36a-38a; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496.

4. Petitioner's argument (Pet. 23-25) that the Commission preferred RKO's application simply because of "the *fact* that it was operating on the frequency" (Pet. 25) is erroneous. The Commission determined, after carefully examining all of the evidence, that both appliacnts were equally qualified. The Commission then concluded that the public interest would best be served by continuation of the existing service (Pet. App. 108a). While that judgment gave the incumbent some advantage, the advantage results from consideration of the public interest. Moreover, the advantage arises only if, after the full hearing required by statute, the two qualified applicants appear equal. The Commission is under a duty to award the license to one applicant

or the other, and it is appropriate for the Commission to look directly to the public interest, as it did here, in order to break the tie, rather than to decide the matter arbitrarily.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIEF FOR RKO GENERAL, INC. IN OPPOSITION

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The opinions of the court of appeals affirming the decision of the Federal Communications Commission and denying rehearing, reconsideration and suggestions for rehearing *en banc* are reported at 515 F.2d 684. The opinion of the Federal Communications Commission is reported at 44 F. C.C. 2d 123.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1975. A petition for rehearing and reconsideration and a suggestion for rehearing *en banc* were denied on June 30, 1975. The petition for certiorari was filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals committed error in affirming a decision of the Federal Communications Commission which found, in a comparative licensing proceeding, that the public interest would be served by renewing the license of the incumbent licensee and denying the mutually-exclusive application of the challenger, the decision being conditioned on the outcome of an issue in a proceeding still pending before the Commission.

STATEMENT OF THE CASE

RKO General, Inc. has operated Station KHJ-TV, Channel 9, Los Angeles, California, since 1951 and received from the Federal Communications Commission successive renewals of its operating authorization at normal three-year intervals through November 1965. In that year, after RKO filed its application for renewal of license, Fidelity Television, Inc. filed an application to build a station at Norwalk, California, also on Channel 9. Since only one of the two applications could be granted and they, therefore, were mutually exclusive, the Commission designated them for a comparative hearing. On December 6, 1973, after a lengthy hearing and the issuance of an initial decision by the hearing examiner, the Commission rendered its decision granting RKO's renewal application and denying Fidelity's competing application — conditioned on the outcome of an issue in another proceeding now pending before the Commission in which RKO and Fidelity are among the participants.

In reaching its decision favoring RKO over Fidelity on the basis of the record then before it, the Commission took into account, but declined to follow, the initial decision of the hearing examiner in favor of Fidelity's application, which he had reached, as he said, "without much enthusiasm." A. 280a. The Commission reviewed KHJ-TV's past broadcast record — which matched the promises it had made to the Commission in its previous renewal application — and decided that it was an "average" performance. Therefore, RKO was accorded neither a preference nor a demerit on that score.[1]

In assessing the applicants with respect to media diversification, the Commission found that in the Los Angeles area there are a plethora of media outlets for diverse and antagonistic views, including 15 assigned television stations, 126 AM and FM stations, and a number of newspapers. It also found no evidence of any attempt by RKO to influence the operation of KHJ-TV so as to promote any national or other uniform expression of political, economic or social opinion, and that, although RKO clearly had more media interests than Fidelity, the nature of RKO's interests was not such as to have any adverse effect on the free flow of information for the audience to be served. The Commission also noted that RKO's ownership of KHJ-TV had been in compliance with the Commission's regulations and consistent with the public interest at all times since the station was acquired. Under these circumstances, the Commission determined that

[1] Since its acquisition by RKO in 1951, KHJ-TV has operated as an independent station, competing in the Los Angeles market with six other VHF stations, three of which were at all times owned and operated by the networks, CBS, NBC and ABC.

neither applicant was entitled to a preference under the diversification criterion.

The Commission also concluded that neither applicant should be awarded a preference under the criterion of integration of ownership and management. It declined to adopt the hearing examiner's conclusion that Fidelity should be assessed a demerit for its integration proposal which placed inexperienced stockholders, working part-time, in supervisory positions and which the hearing examiner characterized as a foolish bit of business which had little chance of being effectively implemented. A. 278a-279a. The Commission found that RKO had afforded considerable autonomy to the local staff in the operation of KHJ-TV and had required mangement of the station to be involved in a wide range of community and civic organizations and to use the information to help determine the direction and programming of the station. It found that during RKO's operation of KHJ-TV since 1951, station personnel living in the Los Angeles area had participated in community activities and acquired broad knowledge of local needs. When the Commission considered these factors in the light of Fidelity's demonstrated inability or unwillingness to carry out its responsibilities in prosecuting its application, it found that Fidelity's quantitative advantage had been neutralized by the adverse qualitative characteristics of its proposal and that, on balance, a preference for neither applicant was warranted under the integration criterion.

Finally, the Commission held that such trade relations activities (reciprocal dealings or mutual patronage) involving KHJ-TV as were disclosed by the record in this case were not the result of either coercion or threats of reprisal and, at worst, affected only an insubstantial amount of commerce. Considering the uncertain legal status of these practices at that time, the Commission could find no basis for charging RKO with knowing and willful misconduct. They raised no meaningful question of RKO's willingness

and ability to act in a responsible manner in performing its obligations as a licensee of KHJ-TV, particularly in the light of RKO's unblemished record as a broadcaster covering more than 25 years. Although the Commission determined that, on the basis of the hearing record in this case, no comparative demerit against RKO was warranted, it noted that the trade practices of RKO and its parent, The General Tire & Rubber Company, was an issue in a pending comparative renewal proceeding involving RKO's Boston station, WNAC-TV, and that Fidelity was a party to the latter proceeding on the issue pertaining to the trade practices.

To summarize, the Commission determined that RKO and Fidelity were essentially on a par under each of the comparative criteria. It decided that it was preferable to renew the license of KHJ-TV since, in a situation in which a challenger will provide no better service than the incumbent, the Commission was convinced that the public interest in the continuity of existing service as well as the public interest in reasonable stability which is necessary to induce efforts and investments in broadcasting required that the incumbent be preferred. A. 108a. The decision in favor of RKO over Fidelity was, however, conditioned on the outcome of the Boston proceeding so far as it might be deemed to affect RKO's licensee qualifications.

The Commission's decision was unanimously affirmed by the court below in a decision which treated all of the issues raised by Fidelity. The court stated that it regarded its task as "scrutiny of the F.C.C.'s ultimate decision in the light of the standards for comparative renewal hearings developed by the agency in the past," and that in its function as a reviewing court:

> "It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority, that it has followed its own procedural rules and regulations, that its

> findings of fact are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions do not deviate greatly from past pronouncements without sufficient explanation, and that in general it has engaged in reasoned decision-making."[2]

Having found no legal error in the Commission's ultimate conclusion that Fidelity, if awarded the license, would provide no better service to the public than RKO had provided in the past and would continue to provide in the future, the court held that the Commission had not erred in awarding the license in these circumstances to the incumbent rather than the challenger who "offers little more and is likely in fact to provide somewhat less than the incumbent." A. 32a.

The court below summarized its decision as follows:

> "It is worth emphasizing the special posture of this particular case. It is based on a record built under standards which have since been upgraded or modified or reconsidered by the Commission. New community ascertainment criteria have been issued and there is now a requirement for something of a continuing dialog between a station and its audience. The agency has also undertaken its rule-making process on cross-ownership. The development, through rule-making, of standards of 'substantial performance' also seems imminent and should prove helpful. We hold here only that under the former criteria the Commission, when faced with a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent, did not commit reversible error by awarding the license to the incumbent."[3]

[2] A. 24a-25a (footnotes omitted).

[3] A. 32a (footnote omitted).

Petitions for rehearing, reconsideration or clarification and suggestions for rehearing *en banc* were denied by the court below in a *per curiam* opinion, with Chief Judge Bazelon issuing a statement as to why he voted to grant rehearing *en banc*.

ARGUMENT

1. This case presents no issue which warrants review by this Court. As the Court below properly decided after an exhaustive examination of all of the objections raised by the petitioner, the Commission's judgment to renew a broadcast license upon finding that the public interest, convenience and necessity would be served thereby was supported by substantial evidence in the record and was entirely consistent with statutory requirements and judicial precedents. The determination was singularly within the discretion of the Commission for, as this Court has stated, "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). All of the arguments which are properly raised here by the petitioner were carefully considered and correctly resolved by the court below, and since there is no issue presented which warrants the attention of this Court, certiorari should be denied.

2. This case is also singularly inappropriate for review by this Court, since the court below explicitly limited its holding in this case to the unique facts presented. A. 32a. The limitation was reemphasized in the *per curiam* opinion denying rehearing and reconsideration. A. 34a-38a. Furthermore, the decision below is, in any event, of a conditional nature, being dependent as it is on the outcome of another proceeding now pending before the Commission

involving an issue (in which Fidelity is participating) relating to RKO's licensee qualifications.

3. Fidelity's primary argument in support of its request for certiorari is that the First Amendment should be construed to require the Commission to award a comparative preference to the applicant with the fewer media interests. Fidelity did not raise this argument in the court below, and it cannot be raised now for the first time in this Court.[4] Moreover, the contention is wholly without merit. The First Amendment prohibits a restraint against freedom of speech; it cannot be stretched to command the affirmative selection by a governmental agency of the applicant which shall receive an operating authority where only one channel is available because of technical signal interference considerations. Fidelity's reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) is misplaced. That case had nothing to do with the selection of an applicant for a broadcast license, related to a fairness doctrine matter, and indeed resulted in a denial by this Court of the claim of First Amendment protection. We have no quarrel with the proposition that the presentation of the greatest possible diversity of information and ideas in a particular community and in the nation as a whole is a regulatory goal toward which the Commission should strive in its regulation of broadcasting in the "public interest." However, the selection of the regulatory approach which will best encourage such diversity in a particular situation should be left to the sound discretion of the Commission. The Court should not freeze a particular approach into a constitutional holding. In the instant case, the Commission, well within the ambit of its statutory discretion, reasonably decided that there were no material differences between the applicants concerning presentation of diverse ideas which would warrant the award of any preference under the diversification criterion.

[4] *See* Duignan v. United States, 274 U.S. 195, 200 (1927).

4. Fidelity's contention that the Commission, in its examination of RKO's involvement in trade practices, improperly focused on the legality of mutual patronage under the antitrust laws misconstrues the decision. To the contrary: the Commission first determined that KHJ-TV was not engaged in an unfair trade practice consisting of mutual patronage resulting from either coercion or threats of reprisal, found that KHJ-TV was involved in a number of mutual patronage situations which were normal at the time, and then specifically addressed itself to the question whether this conduct should reflect adversely upon the character of RKO or its operation of the station. The Commission determined that no adverse conclusion was warranted as a result of the conduct, because the relevant legal and economic concepts were in a state of flux at the time, many other corporations engaged in similar trade relations practices during the period, and there was no basis, in any event, for any finding of knowing and willful misconduct on the part of RKO. When these and other facts cited by the Commission were considered in the light of RKO's unblemished record as a broadcaster covering more than 25 years, the Commission held that no meaningful question was raised about RKO's willingness and ability to act in a responsible manner as a licensee. This determination was clearly a reasonable exercise of the Commission's discretion as to RKO's character as a licensee and the nature of its prospective performance.

5. Fidelity has no sound cause to complain of the Commission decision not to give it a preference for its integration proposal. Pet. 21. This decision was a reasonable exercise of the Commission's discretion and hence not appropriate for independent determination by the court below or this Court. Indeed, in not imposing a demerit, the Commission was generous to Fidelity which had received a demerit from the hearing examiner. Contrary to Fidelity's assertion (Pet. 21), the Commission's conclusion that there

was little promise of effective implementation of Fidelity's paper proposal rested not on mere "allegations" but on undisputed facts which had either been asserted or admitted by Fidelity or its attorneys or were matters of record. A. 106a-107a and n. 28. The Commission reasonably inferred from these undisputed facts that management of a station by persons who had demonstrated in prosecuting their application at the very least an "inability" to comply with the Commission's Rules and Regulations was not to be preferred over management of a station by experienced professionals who had an unblemished record of compliance over many years of operation. Furthermore, as the court below noted (A. 28a-29a), the record contained other substantial evidence in the form of the examiner's decision which supported the Commission's conclusion concerning the implementation of Fidelity's integration proposal. Discernment by the examiner of the character of Fidelity's proposed supervisory management and of their ability to perform, based on observation of them as witnesses, may not be disregarded by the agency, absent countervailing considerations — none of which appear on this record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). In any event, the crux of the Commission's determination not to award any preference to either applicant under the criterion of integration of ownership and management was that RKO's operation of KHJ-TV, in practice, achieved the goals of the integration policy, and that the paper proposals of Fidelity would have done no more.

6. Finally, there is no foundation for Fidelity's contention that statutory provisions to the effect that a licensee obtains no property rights in the frequency it utilizes were violated by the Commission's preference of RKO over Fidelity. The decision recognized no property right in the frequency. The Commission did not base its decision, as Fidelity suggests (Pet. 25), on "a preference for the *fact* that it [KHJ-TV] was operating on the frequency." First, the

Commission found equilibrium in the comparative merits of RKO and Fidelity and then, recognizing that RKO's financial stability had provided an experienced and competent staff for KHJ-TV and afforded the station an opportunity to develop and strengthen its programming and community involvement and to conduct a viable operation in a highly competitive market, it determined that the public interest in the continuity of existing service and in the predictability and stability of broadcast service —without which the overall development and motivation of the industry would suffer — required that the incumbent's license be renewed in the special circumstances of this case. The Commission's decision was neither arbitrary in any way nor beyond its statutory or constitutional authority. Thus, the court below properly concluded that it must be affirmed.

CONCLUSION

The decision below, constituting an affirmance of the determination of a regulatory agency reasonably reached, is correct; there is no conflict of decisions; and no questions warranting further review are presented. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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